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DEFENDANT'S RECEIVER'S EXHIBITS.

To the Honorable THEODORE RUNYON, Chancellor of the State of New Jersey :

The petition of Joseph W. McElroy, of the Township of Pompton, in the County of Passaic and State of New Jersey, respectfully represents : That from the first day of July, eighteen hundred and sixty-nine, to the ninth of June, eighteen hundred and seventy-four, your petitioner was employed as superintendent of their steel works, by the firm of J. Horner & Company, composed of James Horner and James Ludlum ; that on or about the last mentioned date the said partnership was dissolved by the death of the said James Horner.

And your petitioner further represents that on or about the twenty-first day of August, eighteen hundred and seventy-four, a bill was filed in the Court of Chancery by Alice Buckingham, executrix of James Horner, deceased, against the said James Ludlum, defendant, praying, among other things, for a Receiver of the property and effects of said partnership ; and that upon such bill such proceedings were had that an order or decree was made therein on the seventeenth day of November, eighteen hundred and seventy-four, ordering (among other things), that the said James Ludlum be appointed Receiver of the property and assets of every description belonging to the late firm of J. Horner & Company, with power to collect and receive all moneys and other property belonging to the said late copartnership, and to pay out of the proceeds of said property the debts of said copartnership, and to take and retain possession of all such property with a view to the ultimate settlement of the affairs and business of the said partnership, under the direction of said Court.

And your petitioner further represents that the said James Ludlum on or about the date of said order did take possession as Receiver of all the property and assets of said firm, and that by virtue of such order and taking possession, the said James Ludlum, Receiver as aforesaid, became a trustee of said assets for all the creditors of said firm, so far as the same should be necessary as required for the payment of their debts.

And your petioner further represents at the time of the death of the said Homer, and of the appointment of the said Receiver the said firm of James Horner and Company were indebted to your petitioner in a large sum of money, to wit, twenty-five thousand dollars, for the balance due your petitioner for the value of his services as superintendent of their steel works from July 1, 1869, to June 9, 1874, over and above the amount paid to your petitioner on account of said services, which said services were rendered by petitioner for said firm at their special instance and request.

And your petitioner further shows that the said James Ludlum, as Receiver as aforesaid, has sold and disposed of all, or a portion of the property and effects of said firm under the direction of this Court.

And your petitioner further shows, that on or about the 31st of July, 1879, by an order of the Court, made in said cause, the said James Ludlum was removed from the Receivership aforesaid, and Andrew Kirkpatrick, Esq., was appointed the receiver of the property and effects of the said firm, aud that by virtue of an order made in said cause after said removal, the said James Ludlum paid over and delivered to the said Andrew Kirkpatrick United States Government Bonds to the amount of nine thousand five hundred dollars or thereabouts (par value), and that the said Kirkpatrick still holds the same as receiver, together with five hundred

dollars, or thereabouts, in cash interest received on said bonds.

And your petitioner further represents, that the said bonds were bonds belonging to petitioner and were delivered to the said James Ludlum, Receiver, on the delivery to your petitioner of certain personal property of the said firm (purchased by petitioner at a sale thereof made on or about the 21st day of November, 1876), upon the understanding and agreement between the said James Ludlum, Receiver, and your petitioner, approved by the plaintiff in said suit, and by the Court as your petitioner understood, that the said bonds should remain in the custody of the Receiver in lieu of the said personal property purchased by your petitioner, to abide the final settlement of your petitioner's claim against said firm, and that the same, or so much thereof as should be necessary to satisfy the claim of your petitioner, should be returned to him.

And your petitioner further represents that your petitioner purchased the said personal property at the said sale upon the understanding and agreement made, as your petitioner supposed with the approval of all the parties to the said suit, that any amount found due your petitioner from said estate, on the final settlement of his claim against said firm, should be allowed on account of the purchase money, and that (your petitioner having paid in nine hundred dollars on account of his said purchase) the goods should not be delivered until a settlement of the amount due on his claim, but that afterwards, for the convenience of all parties interested, your petitioner, some time in the month of March, 1877, took the said property purchased by him at the said sale, and the said bonds were delivered to said Receiver in lieu of said property upon the understanding and agreement aforesaid.

And your petitioner further shows that on the 26th day of July, 1880, your petitioner presented

his claim for the said balance due him for his services as aforesaid to the said Andrew Kirkpatrick, Receiver, in writing, under oath, and then filed his claim with said Receiver and notified him that your petitioner claimed payment of the same out of the assets of said firm, but that the said claim has not, nor has any portion thereof, been paid to your petitioner by either said James Ludlum, as Recoiver, or said Andrew Kirkpatrick, as Receiver.

And your petitioner further represents that on the 10th day of September last, he commenced a suit against the said James Ludlum, as surviving partner of the said firm of James Horner & Company, in the Supreme Court of the State of New Jersey, to recover the balance due your petitioner for the said services, with interest, and that in said suit your petitioner recovered a judgment against the said James Ludlum, surviving partner as aforesaid, for the sum of twenty-one thousand and three hundred dollars damages and sixty-one dollars and eighty-four cents, cost of suit, as by the record of said judgment remaining in the said Supreme Court or a copy thereof will more fully appear, and to which your petitioner begs leave to refer if it be necessary so to do.

And your petitioner further shows that the said judgment still remains unpaid and unsatisfied, except the sum of $600, which has been received on account thereof.

And your petitioner further represents that the assets of the said partnership in the hands of said Andrew Kirkpatrick, Receiver as aforesaid, and especially the said bonds and money are in the custody of the Court, and are not subject to levy for the purpose of satisfying said judgment, but can be paid out under order of the Court.

And your petitioner further represents that no order was made by the Court in said cause, directing the bringing in of claims, or limiting the time for bringing in the same by creditors, and that the

accounts of the said Receiver have not been settled, and that the said Receiver still has in his hands assets of said firm undistributed.

And your petitioner further represents that as he is advised and believes, he is entitled to be paid the balance due him for his services as aforesaid (at least to the extent of said judgment) out of any assets of the said firm in the hands of said Receiver so far as the same will extend, and to a return of said bonds, or so much thereof as is necessary to satisfy his said claim.

Your petitioner, therefore, prays that an order may be made directing the said Receiver to pay to your petitioner the balance of his said claim (to the extent of at least of said judgment), out of the assets of the estate in his hands, so far as the same will extend, and to return to him said bonds, or so much thereof as will be necessary to satisfy his said claim, and for such further and other relief as to your Honor shall seem meet.

And your petitioner will ever pray, &c.

JOHN R. EMERY,
Solr. for and of Counsel for Petitioner.

STATE OF NEW YORK, }
Passaic County, } ss:

JOSEPH W. McELROY, the petitioner above-named, being duly sworn according to law on his oath, says that the matters and things set forth in the above petition, so far as relates to his own acts, are true, and so far as relates to the acts of others, he believes them to be true.

JOSEPH W. McELROY.

Sworn and subscribed this 6th day of June, A. D. 1881, before me.

GEORGE F. TUTTLE,
Master in Chancery of N. J.

The answer of ANDREW KIRKPATRICK, Receiver of the late firm of James Horner and Company to the petition of Joseph W. McElroy, filed in the above cause.

1st. The respondent has heard that the said Joseph W. McElroy was employed by the firm of James Horner and Company prior to its dissolution by the death of James Homer, but in what capacity or for what length of time respondent has no knowledge, and leaves the petitioner to make such proof thereof as he may be advised.

2d. And the respondent admits the allegations contained in the 2d and 3d paragraphs of said petition which relate to the filing of a bill in the Court of Chancery by Alice Buckingham, and the proceedings had thereon, and the appointment and powers of James Ludlum as receiver of the property and assets of the said firm of James Horner and Company, and he admits that said Ludlum, as receiver, took possession thereof as such receiver, and he admits that said Ludlum became a trustee for the creditors of said firm, but he respectfully insists that it was as much the duty of said trustee to protect the interests of the persons beneficially entitled to said property after payment of debts as it was to protect the interests of *bona fide* creditors of said firm.

3d. The respondent, on information, denies that the said firm, at the time of the death of James Homer, were indebted to the petitioner in a large sum of money, to wit: the sum of twenty-five thousand dollars as stated in said petition, or any other sum for the value of his services as superintendent of the steel works of said firm, prior to said Horner's decease, over and above the amount paid to said petitioner for said services; but he is informed and believes that the said McElroy was fully paid by

said Ludlum the amount due him therefor at, or shortly after the death of said Homer.

4th. The respondent admits that the said James Ludlum as receiver as aforesaid, has sold and disposed of the greater portion of the property and effects of said firm, but answering he says that he is informed by the complainant in the above suit that the said Ludlum, in the sale and disposition of the said estate, has been guilty of many breeches of trust and that his administration of the estate has been highly detrimental thereto, and to the interests of the legatees and derisees under the will of said Horner, who will be beneficially entitled to such parts thereof as may remain for distribution.

5th. The respondent admits that the said Ludlum was removed from the receivership and the respondent appointed thereto on the thirty-first day of July, eighteen hundred and seventy-nine, as in said petition stated, and he admits that the said James Ludlum paid over and delivered to the respondent United States Government Bonds to the amount of nine thousand and five hundred dollars par value, or thereabout, and that he still holds the same together with all interests accrued thereon since the same have come into his possession.

6th. The respondent has heard that the petitioner claimed some interest in said bonds prior to the time when they came into the possession of James Ludlum but he has no knowledge thereof, and leaves the petitioner to make such proof of the same, as he may be able to make, and respondent has no knowledge of the understanding or agreement, if any existed, between the said Ludlum and the petitioner when the petitioner transferred said bonds to said Ludlum, but on information he denies that they were otherwise transferred to said Ludlum than as the price of certain personal property of said firm purchased by the petitioner at a

Master's sale thereof and for which he, as a matter of convenience paid in bonds rather than in cash, and he denies (on like information) that such transfer was other that unconditional and absolute.

7th. The respondent has no knowledge of any understanding or agreement relative to the purchase of the aforesaid personal property by said McElroy, or relative to the delivery thereof to him, or to any allowance to be made to said McElroy on account of his said purchase in respect of his asserted claim against said estate, and he leaves the petitioner to make such proof thereof as he may be able to make, and the respondent is informed and believes that said petitioner some time in the year eighteen hundred and seventy-seven, but in what month he is ignorant, took said goods purchased by him at said Master's sale into his possession, and has since claimed to be the owner thereof.

8th. The respondent admits that the petitioner presented to and filed with him, on or about the twenty-sixth day of July, eighteen hundred and eighty, his claim for a balance which he alleged to be due for his services, and that he notified the respondent that he claimed payment of the same out of the assets of said firm, and he admits that he has paid no portion thereof to the petitioner.

9th. He admits that on or about the tenth day of September, eighteen hundred and eighty, the petitioner commenced a suit against said Ludlum in the Supreme Court of this State, but he denies that such suit was effectual to charge said Ludlum in any other than his personal capacity, and he admits that such suit was brought to recover an alleged or pretended balance due from said Ludlum to the petitioner for said alleged services, and he admits that a judgment was rendered in said suit, for the sum of twenty-one thousand three hundred dollars damages and sixty-one dollars and eighty-

four cents costs, but whether said judgment has been satisfied in whole or in part by said Ludlum this respondent does not know nor has he been otherwise informed than by said petition, and leaves the petitioner to make such proof thereof as he may be advised.

10th. And this respondent is advised and charges that said last mentioned suit was prosecuted by collusion with and at the instigation of said Ludlum and for the purpose of enabling the said McElroy and Ludlum to get into their possession what remains of the estate of James Horner and Company which, under the decisions of this Court made between the parties in interest, would otherwise go to Alice Buckingham, the legal representative of James Horner.

11th. And this respondent answering, says that on or about the day of in the year one thousand eight hundred and seventy-seven, the said McElroy filed his bill in this honorable Court against James Ludlum and Susan H., his wife, Alice Buckingham and John M., her husband, and Susan Horner, for an account of the profits of the said firm from July first, eighteen hundred and sixty-nine, to the day of the death of James Horner, claiming among other things that he was entitled to the one-eighth part of such profits; that the said Ludlum filed an answer thereto admitting such claim, and expressing his willingness to account; that the defendants, Alice and John M. Buckingham, filed an answer, charging that no such agreement had been made, that the said Ludlum was sworn as a witness on behalf of said McElroy and used every effort to give effect to his claim, but that notwithstanding his testimony the said bill, was on the thirtieth day of April, eighteen hundred and seventy-nine, dismissed on the merits, and this respondent is advised and therefore insists, that the

decree made in said last mentioned suit is a final adjudication of the controversy between the said McElroy and Ludlum, the representatives of said James Horner and the present receiver of said estate in respect of any claim for any compensation by said McElroy for work done by him between the first of July, 1869, and the day of the death of James Horner, additional of that which he has already received: and was and is a complete bar to any recovery therefor both at law and in equity, and in particular to any recovery in the action mentioned in the next succeeding paragraph.

12th. That on the tenth day of September, eighteen hundred and seventy-nine, the said petitioner commenced an action at law, being the same action referred to in paragraph nine hereof, to recover compensation for his alleged services rendered to the said firm during the period that he was employed by them between the said months of July, eighteen hundred and sixty-nine, and June, eighteen hundred and seventy-four; that the foundation of the action, to-wit, services rendered between these dates, was the same or that upon which the suit in equity mentioned in the next preceding paragraph was founded; that said Ludlum allowed judgment to go by default therein; that after judgment interlocutory by default had been entered, he applied to the counsel of Alice Buckingham to procure the same to be opened, that after such counsel had succeeded in opening such judgment and after the said Ludlum had expressed a desire that he, the said counsel, should take part in the conduct of the defense, he (Ludlum) refused to plead such pleas as such counsel advised, and no *bona fide* defense thereto being interposed, the said McElroy obtained judgment for the sum of twenty-one thousand, three hundred dollars damages, as hereinbefore set forth.

And this respondent is advised and respectfully insists that neither the Receiver nor Alice Bucking-

ham, as administratrix of the estate of the said James Horner (they not being parties to said suit nor allowed to interfere therein) are bound by said judgment, which can only stand good against James Ludlum, pesronally, and against his separate and individual estate, and, answering, the respondent, says that the said claim in respect of which said judgment was recovered is illegal and invalid; first, because barred in the manner mentioned in paragraph 11 hereof; secondly, because the said McElroy, before the time of the commencement of said action, had been fully paid and satisfied for all services rendered by him to said firm; and thirdly, because such claim, even if valid, or by far the greater part thereof, was at the time of the commencement of said action barred by the Statute of Limitations, and this respondent insists that as against him and the legal representatives of the estate of James Horner, the date of the filing of his petition by said McElroy is the time up to which such statute is to be computed, and even if his (the said McElroy's) claim were in other respects unexceptionable, which he claims, it accrued more than six years prior to the filing of said petition, and is barred by said statute, and no valid promise or undertaking to pay the same binding on this respondent or on said Alice Buckingham, as executrix as aforesaid, has within said period of six years been made.

And this respondent, further answering, insists that any act done or admission made by said Ludlum since the death of said Horner in respect of said claim has been made in collusion with said McElroy for the purpose of defeating the right of the legal representatives of James Horner to share in said estate, and is fraudulent and void.

And this respondent has no knowledge as to whether an order has been made by this Court directing the bringing in of claims or limiting the time for bringing in the same by creditors, and

leaves the petitioner to make such proof thereof as he may be able, and he admits that his accounts have not been settled, and that he still has in his hands assets of the said estate undistributed, but he denies the right of the petitioner to a return of said bonds, or any of them, or to be paid out of the assets of the firm in his hands anything on account of said judgment, and this respondent respectfully insists that the prayer of said petitioner should be denied with costs.

FREDERIC W. STEVENS,
Solicitor and of Counsel with Petitioner.

IN CHANCERY OF N. J.

BETWEEN—
ALICE BUCKINGHAM,
Compl't,
and
JAMES LUDLUM,
Def't.

Before His Honor ABRAHAM V. VAN FLEET, Vice-Chancellor.

MR. JOHN EMERY for Petitioner.

EX-JUDGE STEVENS for the Receiver of J. HORNER & Co.

Transcript of shorthand report of the testimony given in the cause on Thursday, the 6th day of April, A. D. 1882, at the Vice-Chancellor's Chambers, Newark, N. J.

JOSEPH W. MCELROY, a witness produced on the part of the said petitioner, having been duly sworn, according to law, deposeth and saith :

Direct-examination by Mr. EMERY :

Q. What is your present residence ?

A. Pompton.

Q. How long have you lived there ?

A. Since 1864.

Q. What is your age ? A. 58 in October next.

Q. What has been your occupation or business ?

A. I have been a manufacture of steel.

Q. How long have you been engaged in that business ? A. Since 1860.

Q. What were you engaged in before that ?

A. Iron.

Q. How long were you engaged in the manufacture of iron, about ?

A. Well, since about '42 or '43.

Q. Then for the last 35 or 40 years the manufacture of iron and steel has been your business ?

A. Yes, sir.

Q. When did you first go to Pompton ?

A. In May, 1864.

Q. In what capacity or for what purpose ?

A. I first went there to put up a furnace to make a steel on a patent that I had.

Q. You are one of the inventors of a patent for the manufacture of steel ? A. Yes, sir.

Q. For the making of steel by what process—just state generally ?

A. To take pig metal—pig iron and work it in a puddling furnace and take from an hour to an hour and a half or two hours to make it heated and have the steel come out blistered steel.

Q. Make steel by a single process from the iron ?

A. Yes, sir.

Q. In the course of two hours ? A. Yes, sir.

Q. How many furnaces did you put up ?

A. Four.

Q. At whose place ?

A. James Horner & Company.

Q. Did they make any arrangement for using the patent ? A. Yes, sir.

Q. Did you stay there for the working of the furnaces after they were put up?

A. Yes, sir; a short time.

Q. How long? A. Two years.

Q. You were there from 1864 to 1866?

A. Yes, sir.

Q. In what capacity?

A. I was working the furnaces—one of them?

Q. Then in 1866, what did you do?

A. I had charge of a part of the works as superintendent.

Q. What part of the works?

A. Of the puddling first.

Q. And how many processes are there to go through generally?

A. Well, there is puddling first, melting, heating, rolling and hammering.

Q. In 1866 you were superintendent of what part of it?

A. In 1866 I had partial charge of all of it, and a new melting shop was put up.

Q. The works were increased? A. Yes, sir.

Q. How long did you continue under that arrangement? A. 1866 to 1869.

Q. What time in 1869? A. About July, 1869.

Q. Was a new arrangement made with you about that time for your services there?

A. Yes, sir.

Q. What was it?

A. There was an arrangement made I should receive one-fourth—(interrupted).

Q. One-fourth?

A. No, one-eighth, I should say, of the net profits of the steel works, and a guarantee that it should not be less than $3,000 a year.

Q. With whom was that arrangement made?

A. With Mr. James Ludlum.

Q. Prior to that time had you spoken to either of the partners about leaving Pompton for the purpose of taking charge of other works?

A. Yes, sir.

Q. Just state the circumstances of that?

A. I think in the fall of 1868 I was going to Connelsville, Pennsylvania, within sixty miles of Pittsburgh; I had an interest in a steel works there, and the parties connected with it wanted me to come out there and take charge of it.

Q. This is what you told Mr. Ludlum about it, is it; now did you go out there and see them?

A. Yes, sir.

Q. After you had seen them and came back, did you see Mr. Ludlum? A. Yes, sir.

Q. Now state what you said to him about it?

A. I wanted to get off.

Q. From your arrangement there? A. Yes, sir.

Q. When did your agreement expire there?

A. About July.

Q. Of the next year?

A. Yes, sir, about the 1st of July.

Q. Well?

A. And he would not hear to it; I had no written agreement with him, or with the company.

Q. Horner & Co.?

A. Yes, sir, but I thought I was in honor bound to stay the balance of my year.

Q. Well?

A. And then I could have went; but they made this agreement with me for one-eighth of the profits, and I concluded to stay.

Q. That was made after you had informed him that they desired to have you in Pittsburgh?

A. Yes, sir.

Q. Was anything said to you in reference to the proposed Pittsburgh arrangement, or what they would do with you, by either Horner or Ludlum; I mean before this agreement was made in reference to the one-eighth of the profits, as to what they would do with you?

A. Well, they would do better by me, and that I should not use my money out there.

Q. You mean they said that you should not use your money at Pittsburgh, but should let that go and stay with them? A. Yes, sir.

Q. When was the agreement made between you and Mr. Ludlum in reference to the first of July?

A. It was the same time before the first of July.

Q. When was it to take effect?

A. The first of July.

Q. Was it in writing? A. No, sir.

Q. Where was Mr. Horner at that time?

A. Mr. Horner lived at New York.

Q. How often did he come to the works at Pompton?

A. I could not say; probably he would be there once a month or oftener.

A. Who had general charge then of the firm's business there? A. Mr. Ludlum.

Q. What works did they carry on besides steel works? A. File works.

Q. What else, if anything, in the way of business or property was there?

A. They had a farm and the steel works.

Q. But your interest did not extend to anything beyond the steel works? A. No, sir.

Q. After the first of July did you go on under that agreement? A. Yes, sir.

Q. How long did you continue to work there under that agreement? A. Until 1874, July.

Q. What terminated it then?

A. The death of Mr. Horner.

Q. He died some time in June?

A. June the 9th, I think.

Q. 1874. Was there ever any settlement or account made of the profits of the steel works during that time? A. No, sir.

Q. So that you have never received anything on the basis of a share of the profits under that agreement? A. No, sir.

Q. From 1869 to 1874 what was the general condition of the steel trade as to being active or dull?

(Objected to.)

By Mr. Emery: I want to show that these were good years in the steel business.

A. It was prosperous.

By The Court: Confine your questions to these works.

Q. From July, 1869, up to 1874, about how many men did you employ under you?

A. Well, I cannot tell exactly now.

Q. Not exactly, but about?

A. 70 to 85 men I should say.

Q. Did you have under you any assistant as superintendent or foreman? A. No, sir.

Q. You had the supervision of the whole body of men? A. Yes, sir.

Q. Were either of the partners of this firm practical manufacturers of steel?

A. No, sir; not that I know of.

Q. You said that in the manufacture of steel, as you carried it on there, there was several branches; now, give us the first branch or process?

A. First, the "puddling;" by which they make blistered steel.

Q. That is made directly from the pig metal?

A. Yes, sir.

Q. How many men were employed at that generally?

A. There were four puddling furnaces and that took eight men.

Q. And you had the supervision over these?

A. Yes, sir.

Q. And you had to see whether they did their work right? A. Yes, sir.

Q. Does it require experience in steel to ascertain whether the work of puddling is properly performed and carried on by this process? A. It does.

Q. And you were responsible for that branch of the business?

A. Yes, sir; and it requires constant attention.

Q. How many puddling furnaces were there there? A. Four.

Q. After the puddling process, what came next?

A. The melting.

Q. How many melting furnaces did you have?

A. 42.

Q. Did you have the superintendence of all those?

A. Yes, sir.

Q. How many men did you have working on an average at the furnaces? A. Well, I cannnot say.

Q. Were they all working at the same time?

A. No, sir; we worked 12 or 16 and sometimes 24.

Q. How many men did you employ at the melting furnaces while they were working?

A. There were certain gangs of men to so many furnaces. I should think 18 to 20 men.

Q. Did you have the superintendence of them?

A. Yes, sir.

Q. What comes next, after the melting?

A. Then the rolling.

Q. Were those rolled in bars? A. Yes, sir.

Q. How many sets of rolls had you in the factory?

A. Two trains of rolls for finishing steel, and one train—a pair of rolls for rolling the blistered steel —puddling steel.

Q. That made three sets? A. Yes, sir.

Q. How many men were working at those rolls?

A. A. 12 to 15.

Q. You had the supervision of that? A. Yes, sir.

Q. Another branch you spoke of was the hammering? A. Yes, sir.

Q. How many men were employed in that part of the business.

A. Well, about 4 to 6 to work at the hammers and furnaces; there were 2 hammers.

Q. During all this time, 1869 to 1874, did you have the supervision and change of the manufacture of their whole product of steel in that factory?

A. Yes, sir.

Q. Did either of the partners give any assistance

or direction or advice in the manufacture of the steel? A. No, sir.

Q. They left that entirely to you?

A. They left it entirely to me.

Q. How often did Mr. Horner come there, or how often did you see him at the works?

A. I saw him often at the works.

Q. Well, how often?

A. He probably came there once a month or once in two months; sometimes it was longer.

Q. Did Mr. Ludlum take the supervision or charge over the actual manufacturing? A. No, sir.

Q. Now, during that time, what was the character of the business of the firm, as to being large or small, and as to being to the full extent of the works or otherwise?

A. They had all they could do—all the orders we could get out.

Q. Did you work the mills to their fullest capacity? A. Yes, sir.

Q. What were your usual hours of employment; I want you to give the Court an idea of the time you spent about the works?

A. Well, that is pretty hard for me to tell.

Q. Well, you *must* tell; you know better than anybody else?

A. Well, I would be there at all hours; I was there at night and in the morning early, and I was always there during the 10 hours.

Q. What do you call the 10 hours?

A. From seven to six.

Q. That is, you were always there during that time, and were obliged to go over at other hours?

A. Yes, sir; in the morning and at night when they were working nights.

Q. Did they during that part of that time work nights? A. Yes, sir.

Q. And did you have the supervision of that work too? A. Yes, sir.

Q. What was the reason for working nights?

A. In order to do the work and keep up with our orders.

Q. You spoke of being obliged often to get up in the morning early, and before the usual hours—for what purpose was that?

A. I would go out there to see that the heaters had every thing right and had the proper head on the steam, and I was often called out for other purposes.

Q. To see that the material was in the proper condition and in the different stages of manufacture; I suppose? A. Yes, sir.

Q. When night work was necessary up to what time did you usually stop there?

A. Well, sometimes I was there until ten o'clock —nine or ten o'clock.

Q. Were you perfectly familiar with the manufacture of steel in all its branches and departments, as it was there carried on? A. Yes, sir.

Q. So that you could tell whether the work in any of its branches or departments was carried on right by the men? A. Yes, sir.

Q. And if it was not you could correct it yourself?

A. Yes, sir.

Q. Without sending for anybody to assist you?

A. Yes, sir.

Q. Now you speak about a patent, was this patent process of yours used all the time that you were there as superintendent, up to Mr. Horner's death? A. Yes, sir.

Q. What was necessary to the skillful management of that patent and its use?

A. What's that?

Q. Was there any special skill necessary in order that the patent process might be carried on right? A. Yes, sir, very necessary.

Q. Could an ordinary workman manage it?

A. No, sir; not an ordinary workman. He could not do it. It took a good deal of practice

and it had to be shown. I learned all the men that was working with me to work that steel.

Q. About how many tons of steel a day did you turn out from July, 1869, up to Mr. Horner's death in 1874? A. Do you mean finished steel?

Q. Yes, about how many tons of finished steel?

A. Well about 4½ to 5½ tons.

Q. A day? A. Yes, sir.

Q. And that would be a manufacture of about fifteen hundred tons a year? A. Yes, sir.

Q. During the whole time that you were there was there ever any complaint made by either of the members of the firm as to the unsatisfactory character of your work in any respect?

A. No, sir; I never heard of it.

Q. Not in any single instance? A. No, sir.

Q. So far as you know, was your work entirely satisfactory to them? A. Yes, sir.

Q. I understand you to say that no account of the profits was taken. Did you ever speak to either of the partners about taking an account during that time? A. Yes, sir.

(Objected to. Admitted.)

Q. To whom did you speak, and what was said by you about it? A. I spoke to Mr. Ludlum.

Q. What did you say to him or ask him? A. I talked to him and told him we ought to have that matter settled up; that I wanted to know what I was getting.

Q. Under this contract? A. Under this contract; but we were so busy that we could not stop the work to take an inventory.

Q. How long would it have taken to take an inventory? A. 10 days or 2 weeks.

Q. Was that the excuse he gave to you for not taking an account? A. Yes, sir.

Q. Now during that time from July, 1869, to 1874, what did you actually draw from the firm, or what was paid to you? A. I drew from the firm what was necessary to keep my family and nothing more.

Q. You did not even draw your three thousand dollars a year? A. No, sir; I left everything in the office.

Q. You left all your rights under the contract to accumulate, excepting what was absolutely necessary for your support? A. Yes, sir.

Q. Do you know how much you drew during those five years for this purpose? A. I cannot recollect.

Q. About $7,000, wasn't it? A. Probably about that.

Q. And after Mr. Horner's death did you receive the balance of the guaranteed amount of $3,000?

A. Yes, sir.

Q. Did you, during the whole of this time, devote your whole attention to this business?

A. Yes, sir; the whole of my time, with the exception of two weeks that I was away.

Q. What two weeks were they?

A. They were two weeks in 1873, after the panic of 1873, when there was not much to do; it was in November, I think, of 1873, and I was away for two weeks.

Q. So that is the only time you were away during all the time you were there? A. Yes, sir.

Q. Who attended to getting the material ready for the use of the works?

A. I did that; I attended to having it mixed.

Q. Did you purchase it?

A. No, sir; I purchased nothing.

Q. Who attended to the shipping?

A. I did, myself, with the exception of about the two last years when I had a shipping clerk.

Q. Before that time, you attended to that yourself? A. Yes, sir.

Q. During those five years, what was the character of the business of this firm, as to being prosperous or not? A. It was prosperous; very prosperous.

Q. Do you know of any better years in the steel business than those were?

A. No, sir; not with that firm, while I was there, but about others I cannot say.

Q. What, in your opinion, was the fair annual value for your services during these years; what would be the least sum you would fix?

A. For my annual services?

Q. Yes—during these years—according to what you did?

A. I should say not less than $5,000 per year.

Recess.

Q. You recovered a judgment against Mr. Ludlum, as surviving partner, for your claim in the Supreme Court? A. Yes, sir.

Q. Has anything been paid on that?

A. On the judgment?

Q. Yes. A. $600.

Q. Anything beyond that? A. No, sir.

Q. You purchased some personal property at the sale by the receiver of J. Horner & Co.?

A. Yes, sir.

Q. I find in the original papers in this case, there were some orders in reference to that sale; I suppose they might as well be offered in evidence; here is an order for the sale of the personal property—the original sale of the personal property in the original cause; the order is dated the 30th of August, 1876, directing that it be sold by Mr. Ricord, instead of by Mr. Ludlum; and Mr. Ludlum be at liberty to buy; now, how was your purchase at that sale arranged for, as you recollect what was the amount of your purchase?

A. I do not recollect the exact amount.

Q. Was it about—what was the amount of it?

A. Well; I think between 11 and 12 thousand dollars.

Q. Did you pay any portion of the percentage?

A. Yes, sir.

Q. As to the balance, what was your understanding?

(Objected to.)

After some argument Mr. Emery stated that he would withdraw the last few questions.

Q. At the time of this purchase was anything said about your claim or purchase to the Master, Mr. Ricord?

A. My understanding of it was (interrupted.)

(Objected to.)

By the Court: When you were required to pay for the property which you purchased at the Master's sale, did you say anything to the Master who made the sale concerning the claim you had against the estate?

A. No, sir; I think not, to the Master; I did to the receiver.

Re-direct examination:

Q. Was not a letter delivered to Mr. Ricord at the time of the sale in relation to your claim?

A. Yes, sir; I think so.

Q. That's all.

Cross-examination by Ex-Judge Stevens:

Q. You have stated that the steel business was very prosperous between 1869 and 1874?

A. Yes, sir.

Q. Was the business of the firm very prosperous after the panic? A. No, sir; not directly after.

Q. When did the panic occur?

A. I think it was in 1873.

Q. For how long a time after the panic did the business of the firm continue diminished?

A. Up to the time of Mr. Horner's death, we did not have but very little to do; we kept the works running but we did not sell.

Q. How much finished steel on the average did your firm turn out per day during that time?

A. After the panic?

Q. Yes.

A. Well, I could not say, the most of the work we did was to make it into ingots, I cannot say how much there was.

Q. Did you sell those ingots?

A. They were sold at the sale of the personal property.

Q. Then you don't know how much steel was turned out per day after the panic? A. No. sir.

Q. But it was very much less than what had been turned out before? A. Yes, sir.

Q. When did you enter the employ of Horner & Co? A. 1864.

Q. In what capacity?

A. In the first place they employed me as a puddler, and my employers used their influence to get me to stay there to make a success of this patent.

Q. How much did they pay you?

A. I cannot recollect, I think it was $16 a ton.

Q. Were not you paid by the week when you were employed as a peddler? A. No, sir.

Q. Were not you paid regular wages per week?

A. No, sir; I got paid so much a ton, and I got my money every month, I suppose I made $5, or $6 or $7 a day.

Q. When you say you got so much a ton, you mean that was the way in which they paid you your wages? A. Yes, sir.

Q. How much wages did you receive during the time you were a puddler?

A. I cannot tell; I think I made from $5 to $6 per day; I am not sure, but I ought to have made that.

Q. How long did you continue to be employed as a puddler? A. From 1864 to 1866.

Q. On the same terms? A. Yes, sir.

Q. After 1866, what was your employment?

A. Then I was superintendent of the works.

Q. At what salary? A. The first year, $1,500.

Q. Well?

A. The second and third years I think it was $2,000.

Q. Now, when you first came there did you bring your patent with you? A. Yes, sir.

Q. Did you introduce the patent into the business immediately upon your coming there?

A. The first thing I did when I went there was to put up a furnace—build a furnace, which took me from about the 15th of May to the 10th or 15th of July.

Q. Now I want to know when you first came there, whether that patent was used in the shop?

A. Yes, sir.

Q. And you showed them how to use it?

A. Yes, sir.

Q. What disposition was made of that patent?

A. Well, James Horner & Co. bought the patent.

Q. What interest did you have in it?

A. I had a third interest in it.

Q. How much did they buy it for?

A. Do you mean James Horner & Co.?

Q. Yes. A. I think it was $21,000.

Q. Have you been paid for your interest by the firm, or by the surviving partner? A. Yes, $7,000.

Q. You have been paid it? A. Yes, sir.

Q. Then you did not receive any additional compensation for your services by reason of being possessed of the patent?

A. I don't understand that question.

Q. Your wages were not made any higher because you had a patent with you, were they?

A. I suppose they were.

Q. What makes you think so?

A. From the fact that if I had not been there to take charge of it they could not have worked the patent.

Q. Then you think you received a little higher wages than the others because you had been the owner of that patent?

By the Court:

Q. Let me understand; the firm bought the patent of you and paid you $21,000 for it, I understand?

A. Let me make a little explanation, sir; I don't know whether it was in 1865 or in 1876, but Hart-

man, Brunt & Co., had an interest in the firm of J. Horner & Co. from July, I think it was when I first got to making the steel, up to 1865 I think, or the spring of 1866, I don't recollect the date, and because the management of the company was not satisfactory, they paid Hartman, Brunt & Co. so much for the patent.

Q. Hartman, Brunt & Co. and you together owned the patent?

A. I was a member of that firm.

Q. And the firm owned the patent? A. Yes, sir.

Q. In 1865 they sold to J. Horner & Co., for $21,000? A. Yes, sir.

Q. So that after 1865 you had no interest in the patent at all? A. No, sir.

Further Cross-examined.

Q. Then as I understand, having no interest in the patent in 1865, you were employed as a workman, as a puddler there, just as any other workman was?

A. Up to 1866.

Q. Well after 1865 when you sold out the patent?

A. Yes, sir.

Q. Then in 1866 you began as a foreman?

A. Yes, sir.

Q. Now foreman for what? A. The steel works.

Q. Well were you foreman or superintendent then? A. Superintendent.

Q. Were you not also a foreman at one time?

A. I was superintendent, I do not see any difference, I done the same thing all the time, only I had more to do afterwards.

Q. And as soon as you ceased to be puddler there you became superintendent over the whole works? A. Yes, sir.

Q. Did you have any foreman under you:

A. No, sir.

Q. Are you sure?

A. Yes, sir; I am sure.

Q. Was there not a man named Cox in your employ as a foreman of part of the works.

A. No, sir.

Q. Did you have any such man in your employ?

A. Yes, sir.

Q. What was his business? A. Roller.

Q, Was not he a foreman in that department?

A. I never heard him spoken of as a foreman.

Q. Did not he receive more wages than the other rollers? A. He did the rolling by the ton.

Q. Did he receive anything in addition to the othe rollers. Did he get anything more than they?

A. He receive so much a ton.

Q. Well, did he receive so much a ton more than the others?

A. The others done the work by the ton.

Q. Well, did he pay the others? A. Yes sir.

Q. Was not he a foreman then?

A. I did not think him so.

Q. Did he not have some charge over the others to see that their work was done right?

A. Yes, sir; he employed them.

Q. Then he was a foreman, wasn't he?

A. I never heard him spoken of as one.

Q. But in point of fact he was?

A. No, sir; I think not.

Q. Didn't he oversee those who worked for him?

A. Yes, sir.

Q. What would you call a man in that position if you did not call him a foreman?

A. I would call him a roller.

Q. Now, when you first became superintendent, did you have the same duties to discharge that you afterwards had?

A. Well, it kept increasing all the time.

Q. The business did?

A. Yes, sir, and of course I had more to do.

Q. Did your work change in its character?

A. I done the same kind of work.

Q. And the only difference was you had more to do? A. Yes, sir.

Q. How much finished steel did you turn out a day in 1866? A. I cannot tell.

Q. Well, about how much?

A. Well, I suppose three and one-half tons a day; I cannot tell exactly.

Q. How much did the firm turn out in 1867?

A. Well it increased some, but I cannot tell how much.

Q. Did it keep on increasing all the time that you were there down to the panic? A. Yes, sir.

Q. Was there any marked increase during any two consecutive years?

A. I think there was.

Q. Between what years?

A. It increased from 1867 to 1873.

Q. Was the increase gradual?

A. I cannot say as to that.

Q. What I want to know is whether there was any sudden increase up to any particular time?

A. We had all we could do, and we always kept increasing our faclities for making steel.

Q. At what period of time was it you commenced to have all that you could do?

A. I think we had it in 1869; 1868 and 1869, and it kept increasing 1867-8 and 9.

Q. It increased gradually then? A. Yes, sir.

By the COURT:

Q. Do you say they had all they could do from 1868 and 1869 up? A. Yes, sir.

Further cross-examined:

Q. You say from 1867?

A. Well I say it increased.

By the COURT:

Q. At what point of time had you all that you could do; from what time during those years did it increase to such an extent that you had work enough to do to fill your whole capacity?

A. Well I think you had better say 1868, and it kept increasing from 1868.

Further cross-examined :

Q. From what time in 1868 ; the 1st of January ? A. I cannot tell.

Q. Did you have as many men employed in 1867 as you had in 1868 ?

A. No, sir; I don't think we did.

Q. Did your force of men keep increasing all the time up to 1873 ? A. Yes, sir.

Q. Was that increase gradual ? A. Yes, sir.

Q. From year to year ?

A. I think so ; I cannot state.

Q. How many men did you have employed in the steel works in 1867 ?

A. I do not recollect without looking at the book.

Q. Did you have more than half as many men as you did in 1873 ? A. Yes, sir.

Q. Did you have two-thirds ?

A. Yes, sir ; I suppose so.

Q. Fully two-thirds ?

A. I do not recollect, I could not state without looking at the time book.

Q. You do not recollect how many men you employed in 1867 ? A. No, sir.

Q. Do you recollect how many puddlers you employed in 1867 ? A. Four puddlers.

Q. How many men did you employ in the melting furnaces in 1867 ?

A. Well, I do not recollect whether we had moved into the new workshop or not in 1867.

Q. Well state about how many ?

A. I could not tell you, sir.

By Mr. Emery :

Q. A new workshop was built while you were there ? A. Yes, sir.

Further Cross-examined :

Q. When was it built ?

A. I do not recollect when we started it.
Q. When you started it?
A. Well, when I was started.
Q. Well, when was that? A. In 1865, 6, or 7.
Q. One of those years? A. Yes, sir.
Q. Did you enlarge the shops after that time?
A. Yes, sir.
Q. In what way?
A. In the first place we had 24 melting furnaces, and we finally increased it to 42.
Q. When was this increase made?
A. I cannot recollect the year or the dates.
Q. Was it in 1867 or before then?
A. The new works you are speaking of?
Q. Yes. A. I think it was in 1866 or 1867.
Q. You don't recollect how many men you had employed in the melting in 1867? A. No, sir.
Q. Now, how many men did you have working at the furnace in 1867? A. What furnace?
Q. You spoke in your direct examination of its taking 18 to 20 men to work at the melting furnace?
A. Yes, sir.
Q. Now, how many men did you have employed there in 1867? A. We had less than that.
Q. Well, how many less?
A. There was 15 I suppose.
Q. How was the melting done, by contract or days work? A. By the ton.
Q. With whom did you make that contract?
A. Mr. Black.
Q. Was it his business to perform the contract, or see that it was performed by his hands?
A. Yes, sir.
Q. Who hired Mr. Black's hands?
A. He hired them.
Q. How was it in Mr. Cox's case?
A. He hired them himself.
Q. Now, in reference to the hammering, how many men did you employ in 1867, for that?
A. Well, I cannot tell.

Q. How many hammers did you have going in 1867?

A. Two steam hammers, and there was a number of other hammers.

Q. Now, in addition to the puddling, melting and hammering, what else was done? A. Rolling.

Q. How many men did you employ rolling—Oh, Mr. Cox did the rolling? A. Yes, sir.

Q. Now, let me understand you in respect to the hammering, who had charge of the hammers?

A. We had different men at the hammers.

Q. Was that day work or by contract?

A. By day's work.

Q. Was there a foreman to oversee those men?

A. No, sir.

Q. You oversaw them personally, did you?

A. Yes, sir.

Q. Then who took charge of the melting?

A. Mr. Black did that by the ton.

Q. And he did the rolling too? A. No, sir.

Q. Who did the rolling? A. Mr. Cox.

Q. Now, what else was to be done in making up finished steel? A. Hammering and rolling.

Q. Is that all?

A. Then it had got to be cut and taken to the shears and examined.

Q. How many were employed at that?

A. I suppose 8 or 10.

Q. Were there as many as 8 or 10 employed at that in 1867? A. I cannot say.

Q. Well, about how many?

A. I should say about that number.

Q. About how many were employed in the same work in 1873? A. We had more then.

Q. How many more?

A. Well, that is what I cannot state, how many we had.

Q. You stated that you had 70 or 80 men in your employ in the busiest times? A. Yes, sir.

Q. How many of those men were skilled laborers?

A. The rollers, melters, hammerer, blacksmith, one machinist. I consider that skilled labor.

Q. And all the rest were ordinary day laborers?

A. Most of them; most of the rest were day laborers.

Q. How many men did Mr. Cox employ?

A. I cannot tell you that; we worked night and day; sometimes we had a gang for the night and a gang for the day time of 12 to 15.

Q. How many did Mr. Black employ?

A. Well, I don't know; 15 to 20.

Q. Who employed all the rest; did you?

A. Yes, sir.

Q. Directly? A. Yes, sir.

Q. Without any intervention of any contractor?

A. Yes, sir.

Q. How many of those men were used in bringing in coal, and work of that sort?

A. What men have you reference to?

Q. Well, there was certain men to coal the furnaces; how many men did you employ at that?

A. We had one man there.

Q. You have stated that latterly, for the last two years, you employed a shipping clerk to assist you?

A. Yes, sir.

Q. Did you perform the duties of shipping clerk in 1866, 1867 and 1868? A. Yes, sir.

By the COURT:

Q. Just let me understand here whether the men employed by Mr. Black, and the men employed by Mr. Cox, were included as part of the 70 or 85?

A. Yes, sir.

Further cross-examination:

Q. Now, you have stated that you were sometimes obliged to be up very early in the morning, and that you were sometimes obliged to go to the factory in the evening? A. Yes, sir.

Q. Is not that a thing which is always necessary

for the superintendent to do when the business is pressing? A. I have never seen them to do it.

Q. Do not you know that when business requires it that that is to be done by any superintendent of a steel works?

A. I have never seen a superintendent do it, and I have been in steel works all my life.

Q. Then you think you were doing something quite different from the ordinary course of things when you went there in the evenings? A. Yes, sir.

Q. When did you commence to go there early in the evening?

A. During the time I first had charge of the works.

Q. In 1866? A. Yes, sir.

Q. How long did it take you to teach the workmen to manufacture the steel according to your patent process?

A. It would take 2 or 3 years, probably more.

Q. When did you commence to teach them?

A. I commenced immediately after I commenced making steel.

Q. Before you entered the employ of James Horner & Co., where had you been employed?

A. Pittsburgh.

Q. In what capacity? A. Puddler.

Q. For how many years?

A. Well I have been working at making iron and steel for 40 years, from the time I was 17 years old.

Q. When you say you were employed in making iron and steel, you mean in the capacity of a puddler? A. Yes, sir.

Q. After Mr. Horner's death what did you do?

A. After his death?

Q. Yes? A. I did not do anything for three or four years.

Q. Did you obtain a lease of the property which had belonged to the firm? A. Not directly.

Q. How long after that was it you obtained the lease? A. I think in 1876.

(Objected to.)

By MR. STEVENS: I won't press that question now.

Q. Now I want to understand a little more exactly in reference to one thing I understood you to say in 1866 you turned out from 3 to 3½ tons of finished steel a day?

A. I could not say how much we did turn out.

Q. Well, it was about that? A. Yes, sir.

Q. Now, did your business greatly increase from that time on up to 1873? A. Yes, sir.

Q. And did you each year turn out a little more?

A. I think so; yes, sir.

Q. Did you turn out more in 1872 than you did in 1871? A. Yes, sir; I think so.

Q. Did you turn out more in 1871 than you did in 1870?

A. Well, I cannot say without seeing the books; I don't know.

Q. But you think there was a gradual increase?

A. Yes, sir.

Q. That's all.

Re-direct examination:

Q. You had the supervision over the work of Cox and Black and other men in getting out their work by contract? A. Yes, sir.

Q. Is not that the usual course in steel works, that you know of, to have the rolling and melting done by the ton? A. Yes, sir.

Q. What is the office of a superintendent of a factory in reference to the rollers and melters, contractors; what do you have to do?

A. To see that they have the stock to work with and have everything for them to go right on and roll it or melt it.

Q. And do you have charge of their work as they go on; do you see that it is properly done?

A. Yes, sir.

Q. When they are working under contract by the ton, is it necessary that there should be a con-

stant supervision of their work, to see that it is done right? A. Yes, sir.

Q. Did it require your constant care and supervision over all those departments in the manufactory, and did it take your whole time?

A. Yes, sir; it took the whole of my time.

Q. What was the character of the steel produced by the works while you were there, in reference to its salability?

A. The steel was good or it would not have sold as fast as we got it out.

Q. Did you hear complaints from dealers in reference to it?

A. Seldom ever.

Q. So that the work you did was satisfactory to the trade so far as you ever heard?

A. Yes, sir.

Q. You state that you had charge of the puddling when you first went there; is that a part of the process that involves the use of your patent?

A. Yes, sir.

Q. It turned iron into steel and did it rapidly?

A. Yes, sir.

Q. Did they put up a large lot of that kind, Horner & Co.? A. Yes, sir.

By the Court:

Q. Was all the steel manufactured there manufactured by your patent?

A. The blistered steel, the best part of it.

Re-cross-examination:

Q. What articles did you manufacture, what sort of steel?

A. We manufactured tool steel, spring steel, fork steel, machinery steel and most all the steels then in the market.

Q. When it came out finished in what form was it?

A. In bundles of 125 pounds, some more, some less.

Q. Did you have anything to do with buying, going into the market and purchasing the raw material, or selling the steel? A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. Your whole duty consisted in superintending the actual manufacture of the steel at the factory?

A. Yes, sir.

Q. Now, you say Mr. Ludlum is not a practical mechanical manufacturer of steel, do you mean to say he is not familiar with the process of manufacture and that he is incapable of superintending the manufacture of steel? A. No, sir.

Q. Then what did you mean by that when you said so?

A. I meant that he is not a practical manufacturer.

Q. Do you mean to say that he does not understand the manufacture of steel, the practical methods of its manufacture?

A. Yes, sir. I mean that he could not go and show a man how to do it; he could not go and make a lot of this puddled steel.

Q. He could not do it himself?

A. He could not do it himself, or show a man how it ought to be done.

Q. Would not he know whether it was made right or not?

A. Probably he would.

Q. Was not he constantly at the factory?

A. No, sir.

Q. Where was his place of business?

A. At the office generally, and his office was a hundred yards from the works.

Q. He remained in his office close by the factory?

A. Yes, sir.

Q. All the time? A. Not all the time.

Q. Did not Mr. Horner, before his illness, superintend that part of the business which was necessary to look after in New York city?

A. I do not know what Mr. Horner did there.

Q. Was there not an office of the firm in New York city? A. Yes, sir.

Q. And were not Mr. Horner's duties confined to the management of that office?

A. I do not know.

Q. All you know is that Mr. Horner did not come there often to the works? A. Yes, sir.

Q. But Mr. Ludlum was always there, or nearly always? A. Or nearly always.

Q. That is all.

HENRY. J. HOPPER, a witness produced on the part of said defendants, having been duly sworn according to law, deposes and says:

Direct-examination: by MR. STEVENS.

Q. Where do you reside? A. In Jersey City.

Q. And your business?

A. I am not in business at present, unless you would construe a temporary receivership into a business.

Q. What has been your business?

A. Manager of the Adirondack Steel Company.

Q. In Jersey City? A. Yes, sir.

Q. How long have you been engaged in the business of manufacturing steel?

A. Since 1862, until last December.

Q. Are you thoroughly familiar with its manufacture in all its branches?

A. I am, as we manufactured it.

Q. Have you heard Mr. McElroy's testimony with reference to his services as superintendent of the steel works at Pompton?

A. Pretty much all.

Q. What, in your judgment, would be a fair compensation to be paid to the superintendent of a steel works doing the work which he has testified that he was obliged to do?

(Objected to on the ground that it has not yet been made to appear that the witness is competent to testify on this subject.

Q. How long were you manager?)

A. I was the manager the whole time from September, 1863, I was the general manager of the business, and practically, I done the general business of the firm. I did it all pretty much, except the finances. I attended to the correspondence and the sales, and the prices, and everything connected with it.

Q. Buying also? A. Yes, sir.

By The Court: There can be no doubt now about witness's competency.

The stenographer was requested to read the question, and read as follows:

Stenographer: "What in your judgment, would be a fair compensation to be paid to a superintendent of a steel works doing the work which he has testified that he was obliged to do."

Q. From 1869 to 1874?

A. Well, I should say for a concern manufacturing 4, 5, or 6 tons a day, simply for the superinance of the works, about $3,000 a year.

Q. That's all.

Cross-examination by Mr. Emery:

Q. Have you been superintendant of this same company, the Adirondack Steel Company?

A. Yes, sir.

Q. Is that the company of which you are now receiver? A. Temporary receiver; yes sir.

Q. The company has gone into the hands of a receiver lately, or some time ago?

A. Last December.

Q. Of this year?

A. Not hardly of this year, but of last year.

Q. Well, I meant this last December?

A. Yes, sir; but you said "this year."

Q. What was your salary as superintendent and manager of that company?

A. I didn't receive a salary as superintendent. I received a salary as to my general knowledge of the business, and manager of the business.

Q. Well, how much?

A. Up to the time of W. S. Gregory's death I received three-sixteenths of the profits. He died about five years ago last December, and from that time up to the 20th of December I received a salary.

Q. Of how much? A. It ran from $10,000 down to $4,000 last year.

Q. Was it dependent upon the profits?

A. Yes, sir; but there were other contingencies besides profits.

Q. Between 1869 and 1874, what did your salary amount to, or your interest in the profits?

A. I think it ran from eight to fifteen thousand dollars a year.

Q. How many tons of steel did those works turn out during that time? A. What time?

Q. 1869 to 1874?

A. Well, at that time I should think they turned out—of course I can only jump at a conclusion. I did not come here prepared to answer these things.

Q. Well, I did not mean to ask you to give the exact amount to a ton?

A. Well, I should like to look over the books, but I should judge six to eight tons a day—finished work.

Q. How many men did you employ at that time in the manufacture of steel?

A. Well, I should judge about 70 to 75—I should think. We did not manufacture any iron understand, nor do puddling.

Q. What processes did you have?

A. We bought all our stock, we did not manufacture it; we bought all our iron.

Q. What process did you put the material that you manufactured, through?

A. We simply melted them; we bought the iron to melt, but they manufactured their own iron, as I understand it, to a great extent at Pompton.

Q. You bought your own iron and rolled it?

A. Yes, sir; it went through the different processes.

Q. The process Mr. McElroy described?

A. Hammering, rolling, melting.

Q. And did you have your rolling done by persons who charged for the rolling by the ton?

A. Yes, sir.

Q. The melting also? A. No, sir.

Q. That is the usual practice in rolling, is it not? A. Do you mean to pay by the ton?

Q. Yes. A. I think it was, as far as I know.

Q. You were superintendent of the whole process of manufacturing?

A. Well, pretty much; we had an under superintendent.

Q. Under you? A. Yes sir; of late years.

Q. How much did he get? A. About $2,500.

Q. And he was under you?

A. Well, he was what we called the superintendent who had charge under me; I was the manager of the whole business practically.

Q. They had also a financial manager, didn't they? I understood you to say that you managed everything but the finances?

A. Yes, sir; Mr. Gregory managed that.

Q. And he had his interest in it too?

A. Yes, sir.

Q. So that in the superintendency of the actual manufacture of the steel you had the assistance of the under superintendent?

A. Of late years I did, but not in 1869 or up to 1874.

Q. During those years you did not?

A. No sir; I had it to myself to do pretty much in connection with the office and the outside work.

Q. After you had this assistance in 1874 what was your salary then?

A. My salary and interest has been as I stated before.

Q. The same interest existed after that?

A. Yes, sir; but I also had the correspondence and sales to attend to, and the fixing of the prices

pretty much and the trade itself, in fact what was brought to the concern came through me; I having a knowledge of the country and the trade and where it lies and all about it, which makes a big difference.

Q. That's all.

Re-direct Examination:

Q. Then as I understand you, Mr. Hopper, you combined in yourself the labors which were performed at the Pompton Works by Mr. McElroy and Mr. Ludlum also?

A. Well, to a great extent, with the exception of the finances I suppose.

Q. The business of buying and selling and the control of the trade is a very important part of the business and a very responsible part, is it not?

A. I should judge so in the steel business.

Q. It is the most important part, is it not?

A. Yes, sir.

Q. And does that part of the business generally command the highest compensation for one's services?

A. Well, I will leave that for the court to decide; I do not want to be egotistical about it.

Q. Well, that is a fact is not, Mr. Hopper?

A. Well, it is very apparent to any one. In the first place steel is an article which is either good for something or good for nothing. In any manufacture of that article it is necessary to have parties who are familiar with it to see it turned out and that a good article is made in order to suit the wants of the consumers of steel in the country. It requires also a knowledge of the consumers in the country to know what their wants are, and it requires an acquaintance with them all, and a man who can show the most ability in that direction is probably worth the most money, because he has a combination of qualities. I desire to be understood that in giving

my evidence as to the superintendent's salary I refer to the salary of a superintendent of a firm turning out 5 tons of steel a day, and I refer to the salary simply as superintendent; if there is any other benefit or any patent which he owned used by the firm that might be an additional advantage, and there might be an additional salary attached to that, but as I understand this case the patent was purchased and paid for; if it was not, and if that was a part of the services that he was to receive salary for, then he would be worth more.

Q. You mean in the way of royalty on the patent, that that would be worth more? A. Yes, sir.

Q. In reference to the superintendent who you employed at $2,500—what were his duties?

A. His duties were to relieve me in part.

Q. In what part of the management of the business?

A. It was his business to be governed according to my dictation and to see that certain steels came out right; of course when I had time I would go in the factory myself and see him.

Q. He attended then to the practical manufacture of the steel?

A. To a certain extent he did.

Q. Was that his whole duty?

A. Yes, sir; pretty much.

Q. That's all.

Re-cross examination:

Q. You could not trust the manufacture of the steel to this sub-superintendent without your own supervision, to see that everything went on all right. You would not have been willing to do that?

A. Not wholly; but then I have been away a month or two at a time.

Q. Didn't you, while manager, exercise a supervision and control over him, to see that the work went out all right? A. Yes, sir.

Q. And you would not have felt easy in allowing the steel to have been made permanently, or all the time, without your own examination into the working of the factory? A. I would not.

Q. That is, you would not have felt easy to have allowed it to be manufactured all the time under this sub-superintendent? A. No, sir.

Q. Suppose he had been able to relieve you altogether from any duty or examination in the manufacture of steel, so that you could be satisfied that the steel would be turned out all right without any trouble on your part, would he not then have commanded a considerably higher salary, because it would have relieved you from all that part of the business?

A. Well, some people might think that he was just as competent as I was in that respect.

Q. But suppose he had been able to relieve you altogether from all that part of your duty which related to overlooking him and the supervision of the manufacture of steel in any respect, would not then his fair salary have been larger than the amount you paid him?

A. Well, it might have been worth $500 a year more, perhaps.

Q. Do you consider your supervision over him only worth $500 a year in addition to his?

A. Well, he was a young man who came to the office and gradually grew up, there, and gradually became familiar with the business. Of course he had not had as large experience as I had, but, at the same time, he had a considerable experience, and perhaps he could have been superintendent of the works. Perhaps his knowledge of the business would be sufficient to enable him to run the works, and I think it would; still you know we have our peculiar notions in regard to these things, in the manufacture of steel. You may take the principal of the works, and he may have a superintendent whom he relies upon for everything. Yet at the

same time there may be some matters which he will see to himself, rather than anything should go wrong, and which he would have to rectify afterwards, and of course he desires to have his own opinion about those things.

Q. But that don't answer my question. I asked you whether you did not consider your services in the superintendence of this manufacture of steel worth more than $500 over and above the amount paid to this superintendent any how?

A. Well, he was superintendent there in the works.—(Interrupted.)

Q. That is not answering my question?

BY THE COURT:

Suppose you had been desirous to give up all supervision over the manufacture of steel, and your company had been entirely willing to take that part of your duties off your shoulders, for what sum could the ocmpany have secured a superintendent of the manufacture of their steel?

A. Well, I think they could get one for about $3,000.

Further re cross examined:

Q. Do you know any steel works that have secured a superintendent for that amount who would take charge of a business of that character and all responsibilities?

A. Well, that's a question I have never asked about particularly.

Q. In most of the steel works are not the practical men generally gentlemen having some interest in the company?

A. Well, our neighbors have a man that I have learned from some parties that they pay $5,000 a year to-day, but they are turning out about 25 tons of steel a day at least.

Q. You say "our neighbors." Who do you mean by that?

A. James R. Thompson & Co.

Q. Both of the partners in that firm are practical men and attend to the business, don't they?

A. Well, I do not give this as testimony you understand. I heard that he received $5,000 a year.

Q. He has assistance, too?

A. Yes, sir; they all have that.

Q. And he gets $5,000?

A. Yes, sir; but they turn out 25 tons a day, as I said.

Re-direct examination:

Q. Of course the salary of a superintendent of that magnitude would be greater than the works of salary of a superintendent of !works one-fourth or one-sixththat magnitude, would it not?

A. Well, I should most assuredly say so.

THOMAS H. SPALDING, a witness produced on the part of the aforesaid defendants, having been duly sworn according to law, deposeth and saith:

Direct-examination by JUDGE STEVENS:

Q. Where do you reside?

A. Orange, New Jersey.

Q. Where is your business?

A. At West Bergen, New Jersey?

Q. What is that business?

A. Manufacture of steel.

Q. What is the name of your firm?

A. Spalding, Jennings & Company.

Q. How long have you been engaged in that business? A. A little over two years.

Q. Have you a practical familiarity with the duties of a superintendent of a steel works?

A. Yes, sir.

Q. What is your department of the business?

A. Well, for a part of the time I have been in the mill; at one time we were without a superintendent, and for two or three months I ran the mill myself until we got another one; but as a general thing I keep the finances, and as a general thing I

have the general run of the whole business, and whenever I have any spare time I go in the mill.

Q. Have you heard the testimony of Mr. McElroy in reference to the work which he performed as the superintendent of the steel works at Pompton?

A. I have heard a part of it; I came in while he was giving his testimony from the latter part of it.

Q. Did you hear the whole of the cross-examination of Mr. McElroy by myself?

A. I think it was about that time when I came in; he was then describing about the puddling, and the number of men employed, and his different duties.

Q. Then I will state to you very shortly what (interrupted)—

Mr. EMERY: It does not appear from the testimony of this witness he was engaged in the business of manufacturing steel between the years 1869 and 1874, and I do not see how he can testify as to salaries paid during that time.

BY THE COURT:

Q. As to the salaries paid to the superintendent from 1869 to 1874, had you any connection with steel works about that time?

A. No, sir; I had not.

Q. Your attention was directed to the manufacture of steel in what time?

A. A little over two years ago.

Witness withdrawn.

RICHARD WRIGHT, a witness produced on the part of the aforesaid petitioner, having been duly sworn according to law, deposeth and saith:

Direct-examination by Mr. EMERY:

Q. You were bookkeeper for J. Horner & Company, were you not? A. Yes, sir.

A. Before Mr. Horner's death? A. Yes, sir.

Q. For how many years? A. About six years.

Q. Were you the bookkeeper there in July, 1869, and for some little time before that?

A. From the September before that.

Q. At that time was anything said to you by Mr. Ludlam, in reference to a new arrangement with Mr. McElroy, about July, 1869? A. Yes, sir.

Q. What did he say to you?

A. He said I should commence a new account in which Mr. McElroy would be interested.

Q. A new account of what?

A. Of the steel works.

Q. Of what date? A. July, 1869.

Q. And did you then commence and open in the book such new account? A. I did.

Q. What was that called?

A. Steel works new account.

Q. Did Mr. Ludlum tell you the amount of Mr. McElroy's interest? A. He did not.

Q. From that time he had an interest in the firm?

A. Yes, sir.

Q. Were the accounts of the steel works after that date kept separate and distinct from the accounts before that date? A. Yes, sir.

Q. Have you gone over the books for the purpose of ascertaining the amount of business of the steel works from July first, 1869, up to Mr. Horner's death, and the amount in each year? A. Yes, sir.

Mr. Emery: I desire to have this paper which I now produce Marked Exhibit No. 1 for identification.

(The same was so marked by the stenographer.)

Q. What is that paper, Mr. Wright?

A. It is the statement of the steel works account from July the first, 1869, to July the first, 1874.

Q. Showing what?

A. The receipts and disbursements of that account.

Q. Is that taken from the steel works new account? A. Yes, sir.

Q. And the receipts from July, 1869, to July,

1870, would be the amount that was received from the business in that year?

A. The amounts of credits to the steel works account.

Q. How much was that?

(Objected to.)

Q. Were those figures taken from the books?

A. Yes, sir.

Q. Does that represent the state of affairs on the books, and the amount of the business of the steel works for each of the years from July, 1869, to July, 1874? A. Yes, sir.

(Objected to.)

MR. EMERY stated that he merely offered it as a convenient mode of showing what the books contained in that respect, and was willing that it should be subject to correction from the books.

(Admitted subject to objection.)

Q. What was the amount credited to the Steel Works for receipts in the first year from July, 1869, to July, 1870? A. $180,263.

Q. For the second year, July, 1870, to July, 1871?

A. $217,748.

Q. For the third year? A. $236,163.

Q. For the fourth year? A. $355,523; leaving out the cents in each case.

Q. Well, the cents appear on the paper?

A. Yes, sir.

Q. Now for the last July, 1873, to July, 1874, what was the amount? A. $180,948.

Q. That was the year in which the panic occurred, wasn't it? A. That was 1873 to 1874.

Q. And that is the only year in which the business shows a falling off? A. Yes, sir.

Q. What was the general condition of the firm and its business during those years, from 1869 to 1874, as to their being fully occupied in supplying their orders, or having but little to do? A. The business increased.

Q. And were they full of business during all

that time? A. They kept getting more full each year.

Q. From 1869 to 1874? A. Yes, sir.

Q. You have on that also the disbursements, have you not? A. Yes, sir.

Q. (Being shown book marked Ledger No. 4 the witness is asked): Is that one of the books kept by you as book-keeper for Horner & Company?

A. Yes, sir.

Q. Just turn to the Steel Work's new account?

A. (Witness did so).

Q. Is that the book in which you opened the new account? A. It is.

Q. On what page was it opened or commenced?

A. Page 270.

Q. At what time? A. July, 1869.

Q. And that is the one opened by direction of Mr. Ludlum when you understood from that time Mr. McElroy was to have an interest in the works?

A. Yes, sir.

Q. Did you have any other reason for dividing the Steel Work's account on that? A. There was no other reason.

Q. Now, did you keep an account of the business of the Steel Works before that date in this same ledger. A. Yes, sir.

Q. On what pages was that kept there, the account of the business before that time?

A. It seems to commence on page 44 in this ledger, but is not kept by me.

Q. What date? A. October 24th, 1866.

Q. And runs on several pages of this ledger from that date? A. Yes, sir.

Q. There was always an account kept with the steel works, a debtor and credit account in the business of Horner and company! A. Yes, sir.

Q. And there was an account kept with their other works? A. Yes, sir.

Q' Did you keep the old steel works account,

and continue that at the same time as you were running along with the new steel works account?

A. Well, I kept all the accounts that were kept.

Q. After you commenced running the new account of the items of business belonging to the old account you entered into the old account at the same time as you were making entries in the new account? A. Yes, sir.

Q. There was a blank left at the commencement of page 270; do you know what that was left for; was anything said about an inventory

A. It was left, I think, for the amount of the inventory.

Q. Was there an inventory taken about that time that you know of in July, 1869?

A, I do not recollect.

Q. That blank was left for the amount of the inventory?

A. Yes, sir; that is what that was left for.

Q. From July, 1869, to 1874, or to the time of Mr. Horner's death was there any inventory taken that you know of? A. No, sir.

Q. That is after you commenced keeping this account? A. Not that I know of.

Q. And Mr. McElroy's interest had not been set out on these books; his interest in the profits of the concern? No, sir.

Cross-Examination by Judge STEVENS:

Q. Turn to the page on which the Pompton steel works account is kept, or was last kept previous to the opening of the new account on page 270?

A. Witness did so.

Q. When was that balanced?

A. I don't know when; that balance has been carried forward.

Q. Did you balance it?

A. Yes, sir; that is my handwriting.

Q. When did you balance it?

A. I do not recollect.

Q. Did you balance it before or after the death of Mr. Horner?

A. I think after the death of Mr. Horner, when the books were examined by experts.

Q. Then this old account remained unbalanced until that date?

A. Yes, sir; until whatever date it was carried forward.

Q. Now in reference to this new account is there anything in this new account which is connected with the transactions of the firm prior to July first, 1869? A. I think not.

Q. Are you sure of that?

A. If there is it is an error, and I do not think there is.

Q. Do you know positively what this was left open for? A. No; not positively.

Q. Why was not the amount of the inventory put in if the space was intended for that purpose?

A. I intended it for that.

Q. Then why did not you put it in there?

A. I did not have the amount.

Q. Did not you know the amount?

A. I did not.

Q. Wasn't there any inventory taken?

A. I do not recollect.

Q. Have you any doubt about it in 1869?

A. I don't think there was.

Q. Do not you know as a matter of fact that there was an inventory made in 1869? A. I do not.

Q. So that blank has remained up to the present time? A. Yes, sir.

Q. Now how did you make up this statment referring to Exhibit No. 1, for identification?

A. By footing up the debts and disbursements up to the end of the year—July, 1869, to July, 1870, and the same way with the receipts.

Q. Then all you have done is to find out what is the sum of these debits and credits for any one year? A. For the different years.

Q. And this amount represents the aggregate so footed up? A. Yes, sir.

Q. When did you make up that statement?

A. I really can not say.

Q. How long ago did you make it up?

A. I can not say.

Q. Did you make it up prior to the other suit brought by Mr. McElroy in the Court of Chancery in which he claimed to recover a part of the profits?

A. I probably made it up some time during that time.

Q. At whose request was it made up?

A. That I can not recollect.

Q. Were you not directed by Mr. Ludlum to make it up?

A. I think I was more likely directed by Mr. McElroy.

Q. Are you sure?

A. No, sir; I do not recollect.

Q. Is Mr. McElroy's account contained in this book? A. I presume it is.

Q. Will you turn to it, please?

A. (Witness did so); It commences on page 150 and ends on page 354, which shall I turn to?

Q. Turn to page 150? A. (Witness did so.)

Q. Please explain how Mr. McElroy was debited and credited?

A. This was not kept by me until September, 1868.

Q. What do these items on the left hand column on page 150 represent? A. Debts to Mr. McElroy.

Q. For instance, he receives from the farm belonging to the firm $10.16 on the 30th of November?

A. Yes, sir.

Q. And that is debited to him? A. Yes, sir.

Q. He also receives on the same day $6.01 from the store? A. Yes, sir.

Q. Did that store also belong to the firm?

A. It did when I was bookkeeper.

Q. And did the workmen in the employ of the

firm receive so much from the store, and would be debited with that also—or at least Mr. McElroy would be? A. Yes, sir.

Q. This left hand column represents what Mr. McElroy received in farm produce, articles from the store or in cash, and other things equivalent to cash? A. Yes, sir.

Q. Now turn to the next page of the account.

A. (Witness did so.)

Q. Now, is there any account in the books of any money paid Mr. McElroy prior to the 31st October, 1866; would not he, if he were paid wages as a puddler, be paid on the ordinary workmen's pay-roll, and no special account appear in the books as kept with him?

A. I was not with the concern when he was a puddler.

Q. Well, I will ask you this: since you have been in the employ of the firm, has it been the custom of the firm to open an account with the workmen and laborer, or only with the officers of the concern?

A. Only with the officers.

Q. And the workmen's wages would be paid according to the pay-roll? A. Yes, sir.

Q. Which would be entered in the book in a lump?

A. Yes, sir; with the amount against the name, but there was an account against the men kept in the petty ledger.

Q. Is there any account in your books against Joseph McElroy prior to the first of October, 1866?

A. I cannot tell.

Q. Is there any account in ledger No. 3, with Mr. McElroy, so far as you know?

A. I do not know.

Q. Now, the account is carried forward on page 208 and 209 continuously; when does the first entry of regular monthly salary appear on the books in this ledger?

A. You will have to turn to these pages to see

what it is; it might be wages or something else. There is an item on page 150 on the credit side, November 30th, 1866, credit to steel works $262.-64, debit salary account.

By Mr. Emery:

Q. Now do you know what that item is?

A. No, sir; not without looking.

Further cross:

Q. Now turn to the next page on which that account is kept, is it kept in the same way on pages 253 and 252? A. Yes, sir.

Q. What is this 166 and 167?

A. A credit to Mr. McElroy.

Q. For what?

A. Well, I believe it is salary; but to make sure I should have see page 157 in the journal.

Q. To see about that item 166 and 167?

A. Yes, sir.

Q. You believe that to be salary? A. Yes, sir.

Q. Up to June 30th? A. Yes, sir.

Q. Now turn to the next page; is there any break in the account here?

A. No, sir; it is carried forward, and then it goes to page 304.

Q. I call your attention particularly to July 1st, 1869; do you find any break at all in that account?

A. I do not find any.

Q. Now is there in this account of J. W. McElroy anything to indicate any new arrangement with him? A. Nothing except the stopping of the credit of the salary.

By Mr. Emery:

Q. That is stopped in 1869? A. Yes, sir.

Further cross:

Q. The last credit you find of salary is 166?

A. Yes, sir; June 30th, 1869.

Q. But the account is not closed or balanced at that time?

A. This is Mr. McElroy's personal account.

Q. But it is not closed or balanced at that time?

A. No, sir.

Q. But it is carried on in the same way as it had been for several years previous? A. Yes, sir.

Q. Now turn to the next page?

A. It continues on through 304 and page 305 in the same way, and then it goes to page 354 in the same way, and from page 354 and 355 to the next ledger.

Q. The account continues on ledger No. 5, and is continued on pages 160 and 161? A. Yes, sir.

Q. Now is it balanced on page 161? A. Yes, sir.

Q. Now please state whether I am correct in stating the mode in which it is balanced; I find that the account is carried on down to the 23d of June, 1874 on the debit side, and the debit side is carried over on page 161 from the left hand column to the bottom of the right hand column, while at the top of the right hand column of that page we find the credits? A. Yes, sir.

Q. Now among the credits I find the items "by steel works $9, by steel works $15,000," what does that $15,000 relate to?

A. Page 48 on the Journal will explain that.

Q. Then will you please turn to page 48 of the Journal? A. (Witness did so.)

Q. Is this the item to which this refers?

A. Yes, sir.

Q. Steel works to J. W. McElroy for five years' salary to July 1st, 1874, guaranteed to be not less than $3,000 per annum, a further allowance to make the compensation equal to one-eighth of the net profits of the business to be made to him; now is that the $15,000 item referred to? A. Yes, sir.

Q. What does this item mean; old steel works, $1,527.25?

A. Page 49 on the same book will explain it.

Q. I find under date of June 19th on the Journal, page 49, old steel works to J. W. McElroy, for bal-

ance of note due him on account of patent right for steel puddling $3,926.44, interest, $1,800.81, total $5,727.25; now what does that refer to ?

A. It refers to this (pointing to book).

Q. Does that refer to the patent right which Mr. McElroy says he sold the firm in his testimony given this morning ? A. I presume it does.

Q. Now interest, and what does that mean, that $188.85 ?

A. Page 50 in this same book will explain it.

Adjourned until Friday, the 7th day of April, 1882, at the hour of 10 o'clock in the forenoon, at the Vice-Chancelor's chambers.

Transcript of shorthand report of testimony and proceedings in the above stated cause upon the continuation thereof at the Vice-Chancellor's chambers, Newark, N. J., on Friday, the 7th day of April, A. D. 1882, at the hour of 10 o'clock in the forenoon, pursuant to the adjournment last had.

RICHARD WRIGHT, a witness produced on the part of the aforesaid petitioner, having been duly sworn according to law, is recalled for further *cross-examination* by Mr. STEVENS :

Q. Will you please turn to the account we were looking at at the close of the examination yesterday afternoon, and please refer to the item on the ledger under the date of June 23d, interest account, $188.85, and point it out in the Journal ?

A. (Witness did so.)

Q. Interest account of J. W. McElroy for three months and four days interest from July 1st to October 5th, date of maturity on above note of Union Car Spring Company, $188.85, what does that refer to? A. To this note.

By Mr. EMERY :

Q. Mentioned just above that? A. Yes, sir.

Further cross:

Q. I will read the entry "J. W. McElroy, bills receivable for note of Union Car Spring Company four months, June 2d, paid him $10,337.35;" does that appear under date of June 23d on the other side of the ledger account? A. Page 161, it does.

Q. Do I understand you this last item of $10,337.35 is entered in the ledger as having been paid to Mr. McElroy on that date? A. Yes, sir.

Q. What does the interest $138.85 on the other side of the account mean?

A. It means the interest up to the date when he received this note to the time it came due.

By Mr. EMERY:

Q. It is a rebate of interest? A. Yes, sir.

Further cross:

Q. He receives more than is necessary in order to balance the account and so he refunds, or is supposed to refund $188.85, which is charged on the other side of the account?

A. He gets a credit of that.

Q. I mean it is credited on the other side of the account?

A. Yes, sir; because he don't get the note in cash until it becomes due.

Counsel then asked the witness several questions in relation to this which he directed the stenographer not to take down, and then directed the stenographer as follows:

THE WITNESS: I will explain the two entries in this way, that the $188.85 is for three months and four days' interest from July 1st until the time it becomes due, until October 5th, when the note became due, and he is charged with the whole of the note, and credited with that interest until the time it becomes due.

Q. Now, what does this item of cash under date of June 22d, $7,031.03 mean—the credit item?

A. It is cash paid into the company.

Q. Do you mean that?

A. Yes, sir; on this date he was paid $7,031.03 on a check.

Q. What date? A. June 17th.

Q. That appears on the debit side of the account?

A. Yes, sir.

Q. Well?

A. On June 23d, he returns that same check, and he gets this note in exchange, and that with the interest balances the account.

By Mr. Emery:

Q. Together with the other item for the purchase of the patent? A. Yes, sir.

Further cross:

Q. Now, what does he receive on the 23d of June, 1874? A. He receives $10,337.35.

Q. The Union Car Spring Company's note?

A. Yes, sir; and cash $2,600.75.

Q. And upon his receipt of that you balanced the account? A. Yes, sir.

By Mr. Emery:

Q. On his turning over the $7,000 check?

A. Yes, sir; that is, it is credited.

Further cross:

Q. Now, what does the account on page 162 open to the name of J. W. McElroy, mean?

A. These are charges against him.

Q. For moneys which he received?

A. What of it? it is a sum of money I suppose, but I do not know whether if was money or not.

Q. And also farm produce?

A. Yes, sir; and store account.

Q. Articles from the store? A. Yes, sir.

Q. Is that balanced? A. That is not balanced.

Q. Then is all of the money, farm produce, articles from the store received by him after the death of Mr. Horner? A. In this account? no, sir.

Q. Well, after the death of Mr. Horner?

THE COURT: The date of Mr. Horner's death is already fixed as being the 9th of June.

Q, Will you please turn to the item of $15,000 under date of June 17th, 1874, as shown in the journal; were not the last three lines of this item found on page 48 written in by you after you wrote the first three lines?

A. Certainly after it, but immediately afterwards.

Q. Wasn't it written on a subsequent day?

A. No, sir.

Q. How does it come that you made those erasures there?

A. That was some clerical error, probably.

Q. There is an erasure there? A. Yes, sir.

Q. And another one here, pointing to the book?

A. Yes, sir.

Q. By whose direction did you write this!

A. By the direction of Mr. Ludlum.

Q. Was it written after Mr. Horner's death?

A. Certainly, yes, sir.

Q. Now just examine that a little more closely, and see if you do not see it is written in different ink, and at a different time from the first three lines?

A. I recollect that it was written at exactly the same time.

Q. Is there a file works account? A. Yes, sir.

Q. Was the file works in active operation from 1866 down to 1874?

A. You must not ask me anything prior to 1868, the latter part of that year.

Q. Well, from 1868? A. Yes, sir.

Q. Who was superintendent of your file works?

A. Mr. Barrett part of the time.

Q. How many men were employed in the file works? A. Fifty to seventy, but I could not tell.

(Objected to).

A. What salary did Barrett receive?

(Objected to. Overruled).

Q. Is there any entry in these books prior to the time of the death of Mr. Horner, showing any agreement whatever with Mr. McElroy?

A. There are entries in it showing the amount credited to him for salary.

Q. I did not ask you that, I asked you whether there is any evidence—interrupted.

THE COURT: Is not that an admitted fact in the case?

MR. STEVENS: It don't appear yet in this case; it appeared in the other cases, and it appears in the opinion of the judges.

THE COURT: Does not it appear in Mr. McElroy's bill, or in his evidence; has he not already said that there was nothing in writing in relation to the agreement? If you desire you may put this question, is there any entry upon the books showing that Mr. McElroy was to have more than $3,000 a year?

Mr. STEVENS: I do not want to put the question in that shape. The books do not show that he was to have $3,000. There is nothing in the books to show that he was to have that sum.

THE COURT: Well, put the question in your own form, then.

Q. Will you please read the question, Mr. Stenographer?

THE STENOGRAPHER read the question as follows: "Question—Is there any entry in these books prior to the time of the death of Mr. Horner, showing any agreement whatever with Mr. McElroy?

A. Not that I am aware of.

JUDGE STEVENS: We think that Mr. McElroy has been overpaid, and that he has not only got all he was entitled to, but that he has been overpaid.

Q. Does the account you presented yesterday show the net profits of the steel works from year to year? A. Yes, sir.

Q. That is all.

Re-direct:

Q. Mr. Wright, turn to the entry of June 23d, and I call your attention to the credit there to Mr. McElroy, of the item $7,031.03. Is that the same amount which was charged to him as received on the 17th day of June? A. The same.

Q. Now, is not that $7,031.03 the difference between $15,000 and the amount which had been got out by Mr. McElroy from July, 1869, carrying his account through. Does not the $7,031.03 represent the amount that would be coming to him if he were paid his whole $15,000?

A. How do I understand that?

Q. The amount which he had received up to the 17th day of June amounted to what? A. $7,986.10.

Q. Then how is the credit $7,031.03 reached. Is that the difference between that and the $15,000.

A. Did you ask me if that is the difference?

Q. Yes; you credit him with $15,000, and charge him with the difference to balance the account?

A. I think that was the intention, to balance the account.

Q. And then the additional item he was credited with of the amount due him on the notes for the patent. How much were those? A. $5,727.25?

Q. How much do those two items together make?

A. I will have to figure; $12,758.28.

Q. Now, that $7,031.03 was paid him by a check returned by him on the 23d of June? A. Yes, sir.

Q. On that day he got a note of $10,337.35, the cash value of which was $188.85 less? A. Yes, sir.

Q. Now just give me the cash value of that note?

A. $10,148.50.

Q. Now, if he was entitled to receive for his patent, and for the difference of the amount of $15,000 guaranteed salary, which he had not drawn up to that date, the sum of $10,758.28, and he received $10,148.50 by that note, what was the balance he was entitled to receive in cash? A. $2,609.78.

Q. That is the amount with which he was credited?

A. No; which he was paid.

Q. By check? A. Yes, sir.

Q. So he got $2,609.78? A. Yes, sir.

Q. Was Mr. Horner often at the works during that time from 1869 to 1874?

A. Occasionally; not very often.

Q. What was Mr. Ludlum's business relating to the works?

A. He attended to the office, or part of it.

Q. Did he take any active part in the superintendence in the manufacture of steel, where Mr. McElroy was? A. No, sir.

Q. You say, I understand you, that you do not recollect about the fact of an inventory being taken (handing witness a paper), is that in your handwriting? A. Yes, sir.

Q. Now, wasn't there an inventory taken about July, 1869? A. Yes, sir.

Q. And that is the inventory that was taken, and it is in your handwriting? A. Yes, sir.

Q. Which part of it is in your handwriting?

A. It is all mine.

Q. Did you carry that out at the time, in pencil or afterwards?

A. It must have been afterwards—shortly, I suppose.

Q. You do not recollect about that? A. No, sir.

By the COURT:

Q. Do you identify that as an inventory made about the 1st of July, 1869? A. Yes, sir.

Q. Up to July, 1869, was Mr. McElroy credited regularly with the amount of his salary?

A. Yes, sir.

Q. After that date did you credit him with any salary until the entry of $15,000? A. No, sir.

Q. You did not credit him at all on account of his services? A. No, sir.

Q. For what reason?

A. For the reason that Mr. Ludlum told me he had an interest in the business; he did not tell me what the interest was.

Q. The amount was never ascertained, so far as you know, up to that time? A. No, sir.

Q. In Mr. McElroy's personal account would it be necessary in order to keep his account with James Horner and Company—that he was charged with, received from the different branches of their business—would it be necessary to make a division in his account, or separation on the 1st of July, 1869, to keep it straight? A. It would not.

Q. Referring to page 252, ledger 4, both before and after July first, 1869, he is charged with the amounts received from the farm, church, steel works and other accounts, is he not, and the store?

A, Yes, sir.

Q. And those same accounts are credited with it?

A. Yes, sir.

Q. So that he was both before and after receiving money and produce from the different branches of the business? A. Yes, sir.

Q. And the account was run regularly along?

A. Yes, sir.

Re-cross:

Q. Do I understand you to say that Mr. Ludlum never went into the factory to see how things were going on?

A. Of course, he has gone into the factory a good many times.

Q. Did he not go in there to see after things?

A. I think not.

Q. That is simply your supposition as to what he went in there for—he did go there.

A. He certainly has gone into the factory.

Q. You do not know what he went there for, do you? A. I do not.

Q. He did not tell you what he was going there for? A. No, sir.

Q. And he went into the factory very frequently, didn't he—I mean the steel works?

A. He went in occasionally.

Q. Very frequently, did not he?

A. Well, I don't know what to call frequently.

Q. Wasn't the office very close to the steel works?

A. About three minutes walk, I guess.

Q. Wasn't Mr. Ludlum constantly in the steel works? A. He was not.

Q. Where was he?

A. In the office, or at New York and all over.

Q. Did not he constantly go to the steel works for some purpose or other? A. Not that I know of.

Q. You cannot say positively, can you?

A. If he went to the steel works and back again in five minutes I certainly could not tell what he went for.

Q. Did you keep a constant watch on his movements while at the office? A. No, sir.

Q. Did I understand you to say in your examination yesterday that you did not know whether there was any inventory made in 1860, or not?

A. Yes, sir.

Q. Have you never seen that inventory before?

A. Certainly, I made it.

Q. Then why did you say on your examination yesterday that you did not know whether there was such an inventory?

A. Because I did not recollect it.

Q. Do you mean to say that you have not recollected in these various trials in which it has been brought up to your attention—that you did not recollect that paper when I asked you about it yesterday? A. I did not.

Q. Haven't you frequently testified about this inventory? A. I may have.

Q. Is your recollection so bad that you cannot state whether this inventory has not been produced before you on previous examinations, and you examined in reference to it? A. I can not say.

JAMES LUDLUM, a witness produced on the part of the aforesaid petitioner, having been duly sworn, deposeth and saith:

Direct examination by Mr. EMERY:

Q. You were one of the partners of the firm of J. Horner & Co., were you not? A. Yes, sir.

Q. How long had you been engaged in the steel business before the death of Mr. Horner, in copartnership with him, state generally?

A. About twenty to twenty one years.

Q. Mr. McElroy was in the employment of the firm part of that time, was not he? A. Yes, sir.

Q. When did he come there?

A. In about 1864 or 1865.

Q. At the time he came he had a patent process for the manufacture of steel, which you used, or desired to use?

A. He came with his partners in that to bring the patent to our notice in the first place.

Q. And after examining the patent you applied it in the works? A. Yes, sir.

Q. Who attended to puttingit up?

A. Mr. McElroy—Mr. McElroy and his partner, William H. Brunt and Theodore W. Hartman came there, and Mr. McElroy was the practical man, and they did the talking.

Q. After he put up a furnace for it, did you use that from that time on to the death of Mr. Horner?

A. Yes, sir.

Q. Under whose charge and supervision?

A. It was under Mr. McElroy's charge and supervision except for a short time; after we concluded to adopt it; he returned to Pittsburgh after having demonstrated its usefulness, and we employed other puddlers to run it, but finally sent for Mr. McElroy to come back again.

Q. To work that same process? A. Yes, sir.

Q. For what reason?

A. Because the others whom we employed did not succeed in it.

Q. In your opinion did it require a specially skilled workman to operate that process successfully?

A. It was, in fact, the basis of our business.

Q. Explain what you mean by that?

A. It was, in fact, the basis of our business; because the quality of our steel depended on it; other manufacturers, and we, previously had been in the habit of using—(interrupted.)

BY THE COURT:

Q. You say that the patent was the basis of your business?

A. Yes, sir; the patent was the basis; other steel makers and ourselves previously had been in the habit of purchasing expensive iron for use in making steel for mixtures, and this was substituted at a less cost to ourselves by the patent.

Further direct:

Q. Now, go on from the point where you said that finding that the other men who had charge of it, did not work it successfully you sent for Mr. McElroy; do you recollect what year that was, 1864 or '5, was it?

A. No, sir; I cannot fix the date exactly; it was, I think, either in 1865, I think it was in 1865 that we decided definitely to adopt it, and purchase that patent, and he went home, as I have stated, but I cannot fix the date exactly, except by the books; I can by them.

Q. Well, you say he went home?

A. Yes, sir; he went back to Pittsburgh.

Q. And then returned again shortly afterwards, to work that for you? A. Yes, sir.

Q. What work did he do at first when he came there into your employment?

A. His partners, Mr. Brunt and Mr. Hartman superintended a portion of the furnace at that period, and they sent for Mr. McElroy with our consent, to manage the puddling business, which

they themselves had failed to do, and Mr. McElroy cameas a puddler.

Q. Now, just go on and give an account of his employment up to, and till July, 1869?

A. For his puddling work he was paid by some method which I do not recall; at some rate of compensation which I do not remember, without looking at the books; it was the same as the other puddlers in the works; Mr. McElroy developed this peculiarity as a workman: that he not only did his work well, but was willing to show everybody else how to do theirs well; we advanced him to the charge of the business—of the puddling business, and we extended his usefulness, his sphere, rather, in other directions, until he was put in charge of the entire works.

Q. About what time was that; do you recollect?

A. I think that was in 1867 or 1868; that is my impression, although I won't be positive.

Q. He was paid at what rate of compensation then?

A. I don't recollect without looking at the books, but I think it varied from $1,500 to $2,000 a year; previously to that time he had the charge of the works, mostly with the assistance of other superintendents; subsequent to that time Mr. McElroy took the entire charge of the works; this was up to the fall—up to July, 1869; in the fall of 1868, Mr. McElroy's partners, Brunt and Hartman, with the Connellsville Coke Company, near to Pittsburgh, commenced the steel business (interrupted)

By Mr. Stevens: Wait one moment—does this witness know about that?

The Witness: Yes, sir, I do.

Mr. Stevens:

Q. How? A. By personal knowledge; I was present at their works at Pittsburgh, and conversed with them on the subject.

(Objected to, as hearsay.)

Further direct:

Q. Pass over that; it is not so very material, I don't suppose, and come to the arrangement you had with Mr. McElroy?

By the Court: I suppose Mr. Ludlum's testimony is merely introductory to the employment of Mr. McElroy, and to the inducements which Mr. McElroy had to leave the firm?

By the Witness: That is it, exactly.

The Court: Well, that is not important; I suppose Mr. Emery wishes you to state that he expressed a wish to leave the firm in 1868.

The Witness: No, I had no conversation with Mr. Emery about the matter at all.

The Court; No, no, you misunderstand me; Mr. Ludlum, did Mr. McElroy in the fall of 1868, express an intention to leave your employ?

A. Yes, sir; in the fall of 1868 and spring of 1869.

Further direct:

Q. Just state what passed in relation to that?

A. He consented to remain with J. Horner & Co., for the eighth of the profits of the business.

Q. What business?

A. Of the steel manufactory; which was guaranteed by us to him to be not less than $3,000 per year.

Q. That was not in writing? A. No, sir.

Q. When was that to take effect?

A. From the first day of July, 1869.

Q. The arrangement was made, I suppose, some little time before that?

A. About that time; it was concluded at or about that time.

Q. Now, did Mr. McElroy continue working there as superintendent under that contract, up to the time of Mr. Horner's death? A. Yes, sir.

Q. Did you have any change made in keeping

the accounts, in consequence of that arrangement with Mr. McElroy? A. Yes, sir.

Q. What was that?

A. I directed Mr. Wright to commence a new account under the head of "New Steel Works Account," from July 1st, 1869, and to charge to that account everything belonging to it; and to charge to the old steel works account, everything which, in settlement, was shown to belong to it; and that was done.

Q. Did you give him the reason for making that change?

A. Yes, sir; I told him Mr. McElroy was interested in it.

Q. From that time? A. Yes, sir.

Q. Was an inventory taken at that time?

A. Yes, sir.

Q. (Handing witness a paper). Is this the paper?

A. It is either that, or a copy of it; except as to the figures.

Q. In pencil, you mean?

A. Yes, sir, the figures were not carried out.

Q. At that time? A. No, sir.

Q. Those figures were carried out in the suit by Mr. McElroy, in relation to the account, before Mr. Vice Chancellor Dodd, were they not?

A. Yes, sir.

Q. So that the amount was not carried out at that time? A. No, sir.

Q. How did the business of the steel works compare in amount, from July, 1869, to July, 1874, with the business previous to that time?

A. It was larger, and increased very rapidly.

Q. Up to about what time?

A. The business increased, and the sales kept up a steady increase until the panic of 1873.

Q. You mean in the fall?

A. The fall of 1873; the manufacturing continued during the winter of 1873 and 1874, on an increasing

basis, but, owing to the fact that we had a stock on hand, the sales were not as large.

Q. What was the general condition of the steel manufacturing business during this year, as compared with previous years?

A. Well, sir, it was about the same as it had been; generally the steel business was prosperous from 1861, I think, to 1873.

Q. It was steadily prosperous? A. Yes, sir.

Q. Describe the nature of Mr. McElroy's services during these years? A. During what years?

Q. 1869 to 1874, to the death of Mr. Horner. State how far he took charge, and relieved the partners of the concern, and what was the general character of his services?

A. Mr. McElroy took exclusive charge of the steel works business.

Q. State what you mean by that?

A. Of the steel works business, under my general direction as to what should be done; he had the entire charge and relieved the company and myself from all anxiety about the management of the most important department of our business. He devoted himself, day and night, to the interest of the company up to the day of Mr. Horner's death.

Q. Can you tell us about what was the amount of steel product, per day; of the finished steel turned out? A. (Witness considered.)

By the Court:

Q. How many tons?

A. Well, sir; I was considering. It increased under his management, from about two, to seven tons a day, and the latter part of the time it took day and night to do it. I would say that the melting capacity of the works was increased from twelve to forty furnaces.

Q. And Mr. McElroy superintended the manufacture at its increased capacity? A. He did, sir.

Q. He had the sole superintendence of the works at their increased capacity? A. Yes, sir.

Q. Now, what was the character of the work performed by Mr. McElroy in reference to the steel product being of a satisfactory character—the steel turned out under his supervision through this time, how did you find that?

A. Perfectly satisfactory to us and our customers.

Q. Through the whole of the period?

A. Yes, sir.

Q. The amount which was paid to Mr. McElroy for the patent which was used, was not paid in cash to him at the time, was it? A. No, sir.

Q. What did the company give for that?

A. A note of $7,500, indorsed by my father.

Q. And that was settled when?

A. It was never finally settled, sir, uniil the entries on the books, the credits and entries on the books, some time in 1874. There had been some payments on account of it, but it had never been finally settled.

Q. Do you remember about the number of men employed while he was there; and the increase in number, can you give us any idea about that?

A. I cannot, sir; any more than to say that there were a good many more, but I cannot without reference to the books which are not present in my possession, state definitely; but it required more. The number was continually increasing, as the work increased.

Q. About how many men did you employ when the business was at the greatest? A. I don't know, sir; I don't think I ever counted.

Q. Well, as near as you can tell? A. Do you mean in the Steel Works?

Q. Yes. A. I don't know, sir; sixty to eighty; I don't remember.

Q. That is all.

Cross-Examination by Mr. STEVENS:

Q. You speak of this patent, Mr. Ludlum, as being the foundation of your business? A. Yes, sir.

Q. How long did you continue to use the patent? A. We used the patent up to the date of Mr. Horners's death.

Q. Has that patent yet expired? A. I do not know whether it has or not, sir.

Q. In what business are you now?

(Objected to).

By Judge STEVENS: I propose to show that he is now in the steel business, and I desire to find out whether he is still using that patent.

Q. Was that patent one of the assets of the estate? A. Yes, sir.

Q. Was that patent sold at the Master's sale in 1876? A. Yes, sir.

Q. For how much did it sell? A. Owing to the great change in the steel business that patent sold for $90; it had nearly expired.

Q. When did that patent cease to be useful?

A. That patent may be considered useful yet, sir, for some purposes, but for a large majority of purposes for which that was valuable at that time, and for making the quality of steel which was made by us at that time. It has been largely superseded by the Siemens-Martin process, and the steel makers now buy the product which they formerly manufactured.

Q. Was the Siemens-Martin process used by you prior to the death of Mr. Horner?

A. No, it hadn't got into shape, as it was just coming into shape about that time.

Q. Did you use the patent to as great an extent in 1874 as you did in 1866?

A. Yes, sir, I think we kept increasing up to the time of Mr. Horner's death.

Q. So that this patent was in full use at the time of Mr. Horner's death?

A. I believe it was.

Q. And was just as valuable for the purposes of your business as it was before then?

A. No, sir, it was running down very rapidly.

Q. When did it commence running down?

A. About 1874. The other steel made very largely by the Pennsylvania Steel Company and other large concerns like that were made and sold at less for crucible steel purposes than crucible steel could be produced for.

Q. Was the business between 1869 and 1874 profitable? A. Yes, sir, very.

Q. What profits were made each year, about, on an average? A. I can't tell.

Q. Have not you been all over this subject in the other suits and didn't you investigate it?

A. I don't remember, sir, if I did, and if you will show me my evidence of it I will tell you.

Q. Are you unable then to state the yearly profits of that establishment from 1869 to 1874?

A. They began to increase in 1869, and the profits--[interrupted.]

Q. I did not ask you that; I want to know whether you can state what the yearly profits were from 1869 to 1874? A. I can't exactly, sir.

Q. When you say they were very large, about how much did they amount to in the course of a year?

A. Well, sir, I have an impression that the profits of our steel business between 1869 and 1874 varied and increased, from the neighborhood of 20, or 30 to 50 and $60,000.

Q. A year? A. A year.

Q. Is that net profits?

A. Yes, sir, and that's steel business alone.

Q. What became of all these net profits at the death of Mr. Horner?

A. They have been used to pay the old debts of James Horner and company, which was insolvent for nearly ten years before Mr. McElroy took charge.

Q. Do you mean to say that all those profits were used to pay the old debts?

A. No, sir, I do not; I mean to say the books

show the direction of every dollar that was ever made in those works and I can only answer your question by referring you to the great loads of debts—

Q. (Interrupting.) Do you know what the debts of the firm were in 1869?

A. I do not at this moment.

Q. Were they greater in 1869 than in 1874?

A. Yes, sir; I think they were.

Q. How much greater?

A. That I can't answer, but I wish to add for your information—

Q. (Interrupted.) No, I don't want you to do that; I want you to answer my questions; were not the old debts that you speak of of the firm in 1869 less in amount than the debts due from the firm at the time of the dissolution of the firm?

A. I can't state, sir, from recollections about anything of that kind.

Q. To whom did the firm owe money in 1869?

A. I will tell you a few, but I don't think I could begin to tell or to answer it correctly and satisfactorily.

Q. I mean not mere outstanding bills or things of that sort, which are always outstanding in the course of business?

A. No, sir; they were not always outstanding with us.

Q. But I mean the permanent debts of the firm at that time, by which the firm was rendered, as you say, insolvent?

By the COURT: Do you mean debts borrowed for the purpose of furnishing the capital?

By Mr. STEVENS: Yes, sir; I presume that is what the witness refers to.

By the WITNESS: I refer now to debts to the large amount which the firm owed over and above its ability to pay in 1869.

Q. How much did they owe in 1869?

A. I can't answer that question.

Q. Have you ever investigated it or not?

A. I don't know whether I have or not, directly; I may have done so.

Q. Then how can you say that was such a large indebtedness?

A. Because I know that our firm was insolvent for many years.

Q. Did you examine the books carefully with a view to find that out? A. I found that out, sir.

Q. Did you never arrive at any accurate result?

A. No, sir; the fact was rather oppressing any way.

Q. Do the books show the condition of the firm in 1869?

A. I don't know as they do at the time, but the books show, and it has been shown by the testimony given by the accountants in this case, the condition of the firm at the various stages of the firm's existence in order to show that the firm was insolvent and was carried on credit for many years.

Q. You are speaking of the testimony given by the accountants; I am not asking for them; I want you to state your own knowledge whether you, at any period of time, have ever known exactly what the firm owed in 1869?

A. I can't say I do, sir; exactly.

Q. Do you know what the firm owed in 1866?

A. I do not, exactly; I never have given my attention to one particular point, that I remember of.

Q. Did you ever ascertain what the firm owed at any period of time between 1864 and 1870?

A. I presume I always had a general idea at the time, but I never carried it my mind.

Q. Did you ever make a particular examination to find out the indebtedness of the firm in that six years, at any one particular period?

A. I presume the fact was always present on my mind at the period mentioned, but it is not present

to me now what was on my mind then, but I had an intelligent understanding of the business always.

Q. In 1869 you had an inventory taken?

A. Yes, sir.

Q. Was it your practice before then to make a yearly inventory? A. No, sir.

Q. When did you make an inventory prior to that time? A. I don't remember.

Q. When you made that inventory, did you affix to it at the time any prices?

A. I think not, sir; I made only a partial inventory at that time, and only in reference to the steel works in which Mr. Horner was to be interested.

Q. When had you made previously an inventory?

A. I don't remember.

Q. Had you ever?

A. I think I may have done so partially, but that it was exact, I don't remember.

Q. When do you recollect of making a partial inventory?

A. I have told you that I don't recollect.

Q. Just answer my questions; now, when did you take an account of stock between 1864 and 1869? A. I don't remember.

Q. Did you ever take an account of stock?

A. Well, you must wait up until I answer your questions; you commence another question before I have answered the first; I wish to answer your other question; you asked me another question before I had got half through.

The Stenographer read the question to the witness, as follows: Q. When did you take an account of stock between 1864 and 1869?

A. I don't remember of taking at this moment—I don't remember of taking an accurate account of stock in all the departments, but have frequently done enough of it to form the basis of a policy to be pursued in business. In 1869 the only accurate inventory that was taken was with reference to the

steel works business, but I don't remember any other accurate inventory that was taken before 1874.

Q. Can you state within $50,000 what the firm owed in excess of its assets in 1869?

A. No, sir; I would not go anywhere near it.

Q. Or within $100,000?

A. No, sir; I won't pretend to do anything about it, because I have nothing to base it on.

Q. You haven't the slightest idea of what the firm owed in 1869? A. Yes, I have.

Q. So far as the amount is concerned?

A. Not exactly.

Q. Then you can't give it within a $100,000?

A. I can approximate to it, if you will give me time to sit down and figure it up.

Q. Would a reference to the books show?

A. I think it might be derived from the books.

Q. After how much investigation?

A. I don't know.

Q. Would it not take weeks to find out?

A. I don't know.

Q. Would it not take, in your opinion, that length of time? A. I don't know that, sir.

Q, How long do you think it would take to find that fact out? A. I can't tell you, sir.

Q. Have you in any examination to which you have been subjected in the course of these various proceedings been able to state what the firm owed in 1869?

A. I don't remember of having been asked the question.

Q. Has not your attention been frequently called to the fact, both in your examination before the master in taking your account and in your other other examination?

A. I have no recollection of ever being asked the question, in relation to 1869.

Q. Or as to any period of time between 1864 and 1869?

A. I have no recollection of ever being asked the

question as to what the firm owed at any particular time, although it may have been so.

Q. Then, I understand you, you never made it a matter of special investigation as to what the firm owed in 1869?

A. No, sir; you don't understand me so.

Q. Well, what do I understand you to say?

A. You understand me to say that I don't know that I ever did, or that I was ever asked the question, or at least, that is what you ought to understand me to say.

Q. You don't know what the result is now?

A. No, sir; only I know the firm was insolvent for many years.

Q. Do you know what the mortgage debts due from the firm in 1860 were?

A. Oh! I think about $130,000, or $140,000.

Q. What were they in 1874?

A. I don't remember.

By The Court: What is the object of all this?

Mr. Stevens: I desire to show that the witness's statement, that there were large profits made in these years is a myth.

The Witness: I would like to be allowed to answer that question. I wish to ask Mr. Wright if there was any computation made of the profits in these years.

The Court: No, no. You answer the question, and speak from your own knowledge.

Q. Mr. Ludlum, what is your present business?

A. I am president and treasurer of the Pompton Steel and Iron Company.

Q. How long have you been so?

A. Since its organization.

Q. In what year?

A. The latter part of 1876, or the early part of 1877.

Q. Does that organization do business in the same factories in which the business of Horner & Co. was carried on?

A. Yes, sir. It leased the property of Erastus Corning, who bought it.

Q. Is Mr. McElroy in the employ of the company at present? A. Yes, sir.

Q. And has been ever since the organization of the company?

A. Yes, sir. And most other men who were around there at the same time.

Q. What did Mr. McElroy do between 1874 and the time when this company was organized?

(Objected to as not cross-examination.)

THE COURT: That will be your evidence, Mr. Stevens, if you desire to put that in.

JUDGE STEVENS: You may strike out the question, Mr. Knight.

Q. When did Mr. McElroy become superintendent of the steel works of Horner & Co.?

A. I believe I have said in 1865 or 1866.

Q. Did he take entire charge at that time?

A. Mr. McElroy was first a puddler, then he took charge of the puddlers, under a superintendent, which was there with Mr. Horner. Then Mr. McElroy took charge of, first one thing, and then another, until the superintendent was relieved, and then Mr. Horner left, and Mr. McElroy took charge of the whole thing; I cannot give you the exact date when these things occurred, except as it is shown by the books.

Q. Please turn to the books, and show when that was?

A. The books will show when he took a salary in contradistinction to pay for his labor, but they won't exactly demonstrate what his services were.

Q. You said you could fix the time when he became superintendent; and you said you could fix it by the books. Now, I want you to turn to the books and fix it?

A. I said I could not fix it without the books, judge. (Witness referred to the ledger.) I have got to go back of October, 1866, to find it; it is pre-

vious to October, 1866, and you will have to send for the other book.

Q. When did Mr. McElroy go to Pittsburg?

A. In the Fall of 1868, or the Spring of 1869; I won't fix that date exactly.

Q. How long did he remain?

A. I don't remember that, sir.

Q. Did he go to Pittsburg before that?

A. He went to Pittsburg in 1864 or 1865; at the time we had the other puddlers to do the work which he afterwards did; and whether he was there between these two periods I do not now remember, because I have nothing to fix it in my mind.

Q. You state in your direct examination that Mr. McElroy left the employ of J. Horner & Co. for a short time, and that you afterwards sent for him to come back again and remain; now I want you to fix the date of that visit?

A. Well, sir, if you will send for the ledgers, I will try to do it; it was 1864 or 1865; it was subsequent to the purchase of the patent; Mr. McElroy demonstrated its usefulness (interrupted).

Q. Please answer my question.

A. I am trying to do so, exactly; it was after Mr. McElroy demonstrated its usefulness, and the Company thought of purchasing the patent.

Q. At the time when you purchased the patent, in 1864 or 1865, did he remain permanently in the employ of the Company?

A. No, sir; after we purchased the patent he left for Pittsburg, as my recollection serves me.

Q. In what year was that?

A. In 1864 or 1865. And we employed a man by the name of Stout, and another one by the name of Dillon, and another, whose name I forget, as puddlers, while he was gone; I am giving you the facts of the interim.

Q. Please answer my question.

A. I am trying to, but I cannot give you the date.

Q. How long did he remain away at that time?

A. I do not remember.

Q, About how long? A. I cannot tell you.

Q. Over a month? A. I presume so.

Q. Six months?

A. It may have been six months; I am not prepared to say.

Q. Then he returned? A. Yes, sir.

Q. And from that time he remained permanently in the employ of the Company?

A. Yes, sir; I don't think there was any change from that time; I don't think he left there after that.

Q. He was not counted out of the employ of the Company because of that visit, was he?

A. I don't know whether he had leave of absence, or drew his pay, or went out of his time, or how he went, I don't remember.

Q. Now, you said that the agreement was, that he was to receive one-eighth of the profits, and that the firm was to guarantee him $3,000 a year?

A. No, sir.

Q. Is not that it? A. No, sir.

Q. How is it then?

A. The agreement was that Mr. McElroy was to remain for one-eighth of the profits of the business, the firm guaranteeing that that one-eighth should not be less than $3,000 a year.

Q. When was that agreement made?

A. On nearly, or about the time when he commenced his services, under that agreement, probably a little before, to enable us to make preparations for it.

Q. Was that agreement ever renewed in future years?

A. Only as the year rolled round; we had no time to take our inventories.

Q. Was that agreement—(interrupted.)

A. I am telling you, sir, if you will wait; it was renewed in occasional conversations in reference to a settlement, and in reference to taking an inventory

to ascertain what the profits of the business were, and being so perfectly patent that the firm was prosperous and making money, and overrun with business, and having no time to stop to take an accurate inventory, necessarily it was postponed simply from time to time, always with the intention of taking it, but still not doing it.

Q. I didn't ask you all that?

A. I understood you to ask me that.

Q. I didn't ask you that, at all; if you will confine yourself to my question, I shall be very much obliged to you; I want to know how often, after 1869, the agreement was renewed?

By Mr. Emery: This is your evidence.

Mr. Stevens: Oh! no; it is not; this is cross-examination.

A. There were occasional conversation in reference to it, and that is all I can say.

Q. Were those conversations repeated year by year? A. No; not verbatim.

Q. In substance?

A. It was understood frequently between us, that the arrangement under which the thing was being done was continued, and the reason that no settlement was made was because it was useless, and it made no difference.

Q. Then I understand you to say, you made from time to time a new agreement of the same purpose which you had made on or shortly prior to July, 1869?

A. You ought not to understand it in that way at all sir; I have not said so.

Q. You stated that the agreement was renewed from time to time, in conversations had by you with Mr. McElroy, in the course of which you alluded to the—(interrupted.)

A. I said that the conversations with Mr. McElroy were with reference to the agreement under which we were working, and the reason we did not stop to carry it out, in dollars and cents, by a settlement,

was because the firm was unquestionably prospering, and there was no necessity for stopping the works the length of time that would have been necessary to have made an inventory.

Q. Now, I ask you whether the agreement was renewed from year to year?

THE COURT: Judge, I think the difference between you and the witness consists in the difference of understanding of the word "renewal."

Q. Now, you are a business man of large experience, and you know exactly what the word "agreement" is?

A. And the word "renewal" also.

Q. Now, I ask you whether there was any new agreement between you and Mr. McElroy after July, 1869, with reference to his compensation?

A. There was, to this extent: that the old agreement was continued, and it was understood between us that the thing was continued.

Q. Now, I ask you, how often that agreement was continued between 1860 and 1874?

A. I cannot say; I cannot tell you anything further than that we would speak in reference to taking an inventory.

Q. Was it continued from year to year after that time?

A. Well, it is possible we may have spoken of it a half a dozen times a year; Mr. McElroy was always asking me in the spring of the year about taking an inventory.

Q. I am asking you what the fact is, not what was possible?

A. I can only say that it only grew out of conversation between him and me in reference to taking an inventory in the spring of the year.

Q. Now, I wish to call your attention to your testimony in the case of "McElroy *v.* Ludlum and others," in chancery, in reference to the accounting which Mr. McElroy claimed in a suit on the basis of the agreement which you have mentioned. Did

you testify in that suit as follows: "What were "the terms of the agreement—the last agreement— "with Mr. McElroy, made prior to July 1st, 1869?

"A. The agreement between Mr. McElroy and "the firm of James Horner & Co. was that from the "1st day of July, 1869, he should receive, as a com- "pensation for his services, a salary which should "be equivalent to one-eighth of the profits of the "business; and to insure him against loss, it was "agreed and understood that its profits should not "amount to less than $3,000 per year; he was "simply a salaried superintendent, and the amount "to be guaged in that manner."

"Q. He supposed that the one-eighth of the "profits should not be less than $3,000 in each year "thereafter in his account; is that correct?

"A. That is correct.

"Q. Was he to be paid a salary, at the end of "each year, which should at least amount to "$3,000?

"There was no understanding that it should be "paid at the end of each year; whenever a settle- "ment took place between us, he was to receive "one-eighth of the profits of the business and sup- "posed that it should not be less than $3,000 a year "thereafter, and as more as the business would "bring it to.

"Q. Now, was that agreement to stand any longer than a year?

"A. Yes, sir; it was to stand continually; right along.

"Q. But was not limited to the first year of his employment?

"A. No, sir; it was not."

Did you testify in that way in that suit?

By Mr. EMERY: He is now reading testimony for the purpose of contradicting his own cross-examin- tion.

Q. Did you testify in that way?

A. I think I did, sir; I think that is as I understand it.

Q, Now, did you, subsequently, Mr. Ludlum, go before Mr. Romaine of Jersey City, the master who took the testimony which I have just read, and, in the absence of any of the counsel and of the parties to the suit, testify in reference to the same thing again?

A. I went there, as I understand it, upon a day of which the other parties had had notice, and promised to be there, and I made an affidavit, or gave additional testimony in reference to that case, in their absence, but not clandestinely or surreptitiously.

Q. Was that day upon which you went there and testified a day fixed as the adjourned day by the counsel in that case?.

A. I don't know; I understood it to be so, sir.

Q. Are you not confusing that day—the day which you understood to be fixed by counsel—with another day to which I have before referred and on which latter day you made the ex parte statement?

A. No, sir; I do not conceive it possible that I could be mistaken in a matter of that kind, because I do not conceive it possible that I could do such a thing as that, sir.

Q. Wait a moment; let me call your attention to this fact: "Whereupon the examination was adjourned to a day when the testimony could be written out, when the witnesses are to be at liberty to read the testimony, and sign the same. "The evidence having been produced to me "Wednesday, September 26th, at two o'clock in "the afternoon, at the same place, so appointed "for such reading and signing." The postponement, then, was for the purpose of enabling you to read and sign the testimony, was not it?

A. I don't know, sir, what it was for; I don't know anything about that entry; I didn't swear to that.

Q. Is that entry incorrect?

A. I don't know, sir; I was simply a witness in that case.

Q. This entry goes on farther to state: "At which "time and place the witness appeared, and no per- "son appearing for the defendants, Buckingham, "the testimony was read to him, and he desired "to correct the same, as follows: 'Witness says, "I sent a telegram and a letter to Mr. Keasby on "Monday, and also wrote a letter to Mr. Buck- "ingham the same day, and directed it to his "office in New York City, that the Master had "appointed Wednesday, the 26th, at 2 P. M., for "a further hearing in this case; I also wrote to "the same effect to A. S. Jackson.'

"I desire to say that I explained in my testi- "mony who no settlement was had with Mr. Mc- "Elroy, and I do not see it properly stated in "my evidence."

Then you go on to say, in answer to the question on the 27th page: "Q. Was he to be paid a salary "at the end of each year, which should at least "amount to $3,000?

"A. I wish to say there was no day for pay- "ment; he had the right to draw at any time with- "in the year, for his proportion of the $3,000, "which was guaranteed to him, and the balance, "if any, at end of the year."

In answer to the question on the same page: Q. Now, was that agreement to stand any longer "than a year? I desire to say the first agreement "was for one year only, but it was continued, for "five years, by virtue of the yearly arrangements.

"In answer to the question on the same page: "Q. But was it not limited to the first year of his "employment? I desire to say, it was not limited "to any one full year. Any party becoming dis- "satisfied had the right to close it within the "year."

A. Well, sir; I wish to say right there, in reference to that—(interrupted).

By The Court: You had better wait until the Judge puts his question, and then you can make any explanation you desire to, afterwards.

Q. Now, the hearing was adjourned for the purpose of enabling you to read over the testimony, and to make any correction in it, you might desire, was not it?

A. I don't know, sir; Master Romaine had charge of that suit, sir, in Jersey City.

Q. Do you remember anything at all about it?

A. I do, sir.

Q. Was not the adjournment, then, for that purpose only?

A. I don't know, sir; I simply know that I went there on a day it was adjourned to, and I gave testimony which I supposed was legitimate and proper, or the master would not have allowed it.

Q. Is the statement made by Mr. Romaine in reference to the purpose of the adjournment, do you think, incorrect?

A. I don't know anything about Mr. Romaine's statements.

Q. Now, I was mistaken in saying it was another day, but did not you on the same day, after you had closed your testimony, and so signed it, (showing it to witness, and referring to page 36 of the printed case), didn't you in the absence of the counsel and all of the parties to the case, except yourself, did not you make a separate independent statement in reference to the same matter of Mr. McElroy's compensation.

A. I made a correction at that time, but whether it was made with the advice of counsel, or whether it was made in the presence of counsel, I mean Mr. Jackson, I don't know; I have a recollection at that time, that something was said by somebody, and it may have been by me, for all I know, about notice given for the other party to be present; I

don't know, or undertake to know, or pretend to know, anything about the legality of any notice; neither do I know what the notice was; I know I appeared and made a correction of my testimony, in the absence of Mr. Buckingham's counsel, and whether Mr. Jackson was there I don't know; neither do I know whether what I did was legal or not.

Q. I will ask you whether you did not in that same explanation of your testimony testify as follows, in reference to the compensation of Mr. McElroy. After stating that he receives a salary of $1,500, and then a salary of $2,000, you say: "His second year under the last-named "rate had not expired, but by the terms "of agreement, either party had the right to with-"draw. For satisfactory reasons which I could "state if necessary, it was cancelled, and the new "arrangement made by which he was to receive as "his portion, $\frac{1}{8}$th of the profits of the businesss "which were guaranteed to be not less than $3,000 "per year. In these different arrangements with Mr. "McElroy, the invariable rule of the firm in such "cases was followed, to make no bargains for more "than one year, and either party becoming dissatis-"fied, had the right to cancel at any time, upon the "principle that no incompetent or unwilling service "could be profitable." Did not you testify that way at that time?

A. Yes, sir; I think that conforms to what I have testified to this morning exactly.

Q. Now, you said that you directed Mr. Wright after opening the new account of the steel works, to charge in that account everything belonging to it. Did he do so? A. I believe he did.

Q. Is that new steel works account charged with its proportion of the interest on the mortgage indebtedness of the firm?

A. No, sir; it was not understood to be so.

Q. Is it charged with any portion of the capital of the firm?

A. No, sir; It was not understood to be so.

Q. Did you have any definite understanding with Mr. McElroy about that?

A. Yes, sir; Mr. McElroy put his services against the capital, and we furnished the property.

Q. That is the first time you have testified to that, is it not? A. I think not, sir.

Q. Did Mr. McElroy put into that account everything that belonged to it? A. Mr. McElroy?

Q. Mr. Wright, I should say.

A. I believe he did, sir.

Q. Have you ever examined to see?

A. I have run over that account from time to time.

Q. Has he done so?

A. I think everything is in that account that ought to be there, according to our agreement.

Q. You stated that after 1873 you continued to manufacture steel? A. Yes, sir.

Q. As much steel as you did before as that was?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir; but not to put it into salable shape, but to manufacture steel from the stock on hand into ingots ready for rolling.

Q. Did you buy any such material after 1873?

A. We bought very largely in the fall of 1873; we made our arrangement for supplies in 1873 for a largely increased production again, and we got those supplies by canal, and consequently we put them in to carry us all the way during the winter and up to May or June of the following spring.

Q. Did you buy anything more in June or the following spring?

A. I say that we bought enough to carry us through and having that stock on hand we considered it policy to work it up and avoid spring strikes.

Q. Did you buy more stock in the spring?

A. I do not remember, sir, the transactions in the spring, but I remember distinctly the general policy of the business, in the fall of 1873.

Q. How many tons of steel did you turn out per day in 1866? A. I do not know, sir.

Q. How many in 1868? I do not know, sir.

Q. How many did you turn out in 1869?

A. I do not know, sir.

Q. Haven't you any idea?

A. No, sir; no idea. I know we increased the product of the works, increased from 2 or 3 tons a day up to 6 or 7 tons a day, but those things we never kept a daily account of, but would carry the product up through the months for we frequently stopped in the work which might make the average less.

Q. It would make it less? A. It might.

Q. You think it might have been less than 6 or 7 tons? A. It might have been, I do not know.

Q. Now when you say you commenced with 2 or 3 tons a day, what period of time do you refer to?

A. I think about the time Mr. McElroy came there in 1864 or 1865, when we were using 12 furnaces, and 12 furnaces, each of them being used daily, would give 2¼ tons of steel a day, and 40 furnaces would make 7 tons a day and we had 40 at last.

Q. When were the 40 furnaces built?

A. After Mr. McElroy came there.

Q. In what year?

A. There was an increase in 1869, and subsequently there was an increase made between that time and 1870.

Q. How many furnaces did you put in in 1866?

A. I don't remember that, that is the exact year, I say it was about that time.

Q. About how many were put in?

A. We put in 24.

Q. Then you put in 14 more between that time and 1870?

A. We put in 18 more between that and 1870.

Q. Yes, but you cannot say when?

A. I cannot give you the exact date, sir; but they are there now.

Q. That's all.

WITNESS: I wish to say in reference to—(interrupted).

BY MR. STEVENS: I object to that, if he wishes to explain any answer he made to any question I have put.

(Objection overruled and witness allowed to go on).

WITNESS: I want to say that the renewals, that were called renewals of agreements, which you have referred to as testified to before Master Romaine was just exactly what I meant when I spoke of confirmation or continuation of the old agreement in my testimony of to-day; that's what I meant by the two.

Q. Then do I understand you to say that what you mean by confirmation is a renewal, or that what you meant by a renewal is a confirmation; you know very well that the two words are not equivalent?

A. I meant a continuation of the agreement between Mr. McElroy and the firm was a virtual renewal, if you choose to call it so. I mean that they are the same thing.

Q. That's all.

JOHN COX, a witness produced on the part of the aforesaid petitioner, having been duly sworn, according to law, deposes and says:

Direct-examination by Mr. EMERY:

Q. You were employed by J. Horner & Co. to the time of Mr. Horner's death?

A. Yes, sir.

Q. And for how long a time previous?

A. I went to work for them first in 1855.

Q. In what capacity? A. As a roller.

Q. Did you continue working on the rolls up to the time of his death? A. Yes, sir.

Q. Do you recollect Mr. McElroy when he was superintendent there? A. Yes, sir.

Q. What time did he become superintendent, do you recollect?

A. As near as I can recollect it was in 1866.

Q. And he continued to be superintendent from that time up to the time of Mr. Horner's death?

A. Yes, sir.

Q. What was the general nature of his business about superintending, did he have charge over all the men?

A. Of the whole business in the works.

Q. How was Mr. McElroy's performance of his duties as to attendance to his work during the day?

A. Well, he was always there. I always found him whenever I wanted him, around the works— some portions of it.

Q. Did you go to him for advice and directions as to the manner of completing your work?

A. Yes, sir. I received all my directions from him.

Q. Did he supervise your work and see that it was done according to orders?

A. Yes, sir.

Q. And he was in attendance there the whole time? A. Yes, sir.

Q. How was it in reference to the management of the men—were there any difficulties or strikes while he had control?

A. No, sir. If there was any difficulty with the men he always settled it. I considered him superintendent, and I always made my complaints to him, and we would talk the matter over and if it was necessary, we would discharge the man, whoever it was, caused the trouble.

Q. He had charge of the men in the factory?
A. Yes, sir.

Cross-examination by MR. STEVENS.
Q. What was your position in those works?
A. I am not working anywhere now.
Q. I say what was it?
A. I was roller-steel roller.
Q. How many men did you employ?
A. From 12 to 15 men when running night and day.
Q. Did you employ them yourself?
A. Yes, sir, I did.
Q. And you say that they did their work properly? Yes Sir.
Q. That's all.

By MR. EMERY: I have no other witnesses except Mr. Thompson, whom I desire to call. I offer in evidence certified copy of the judgment obtained by Mr. McElroy against Mr. Ludlum.

By MR. STEVENS: I object to that being offered for any purpose whatever. I consider it thoroughly incompetent, and I would like counsel to state what he offers it for.

By MR. EMERY: The ground in the petition sets out what it is offered for.

By MR. STEVENS: It is a judgment againsta surviving partner, and I object to it as incompetent as against the representatives of the deceased partner.

JAMES LUDLUM, a witness produced on the part of the aforesaid petitioner, having been already sworn is recalled to testify in relation to the above-stated judgment.

By MR. STEVENS: I presume Mr. Ludlum is competent, but I desire to protest against his testifying in this matter.

He is the surviving partner and it seems hardly right that he give evidence in this matter.

By THE COURT: Your objection is as to the taste of the thing and not as to his competency. I cannot, of course, do more than sit here and decide questions of law as they come up.

Direct Examination, By MR. EMERY:

Q. What, in your judgment, was the fair value of Mr. McElroy's services during the years from July 1st, 1869, to July 1st, 1874, per year?

A. I always believed that Mr. McElroy's services were worth all he got, and all that we had agreed to pay him, or I would have discharged him. I would not expect to hire the quality of services which he rendered to our company—(interrupted).

(Objected to.)

(By THE COURT):

Q. What could this firm have procured the services of another man of the same skill and experience for per year?

A. I have never heard of any other man who was fitted for the place exactly that Mr. McElroy took. I think he was worth $500 a month, as a salary.

Not cross-examined

By Mr. EMERY: I offer in evidence all the Exhibits I have used during the testimony.

Mr. STEVENS: After a little discussion, stated that he had no objection to the statement prepared by Mr. Wright and heretofore marked No. 1, being admitted subject to correction from the books.

Mr. Wright's statement marked Exhibit No. "1")

(Inventory marked Exhibit No. "2")

JOSEPH MCELROY, a witness, produced on the part of the petitioner and having been duly sworn, is re-called for further *cross-examination*.

By Mr. STEVENS:

Q. I think you stated on your examination that you had received on account of your judgment $600, or some other sum? A. Yes, sir.

Q. Who paid you that? A. Mr. Ludlum.

Q. Did you receive that on any execution issued on your judgment, or was it paid to you direct by Mr. Ludlum? A. I don't remember that.

Q. Did you make a levy on Mr. Ludlum's personal property? A. Yes, sir.

Q. His personal property? A. Yes, sir.

Q. What property?

A. I do not recollect; horses and wagons.

Q. And who paid you that money?

A. I don't recollect just how that was; how he fixed it.

Q. Well, who paid you the money?

A. It was turned in to my account $600, and I held the levy against the property.

Q, Who paid you the money?

A. I have never been paid any money.

Q. Your answer states that $600 has been credited on account of the judgment; now, what I want to know is, where you got that $600 from?

By the COURT:

I understood the witness to say his account was credited with that amount.

Q. What account was credited, your account with whom, with the Pompton Steel Works?

A. It was credited on my account.

Q. Which account?

A. With the Pompton Steel Works; Mr. Ludlum's things were levied on, or whether they were levied on or not, he turned those things in to me at the value of $600.

Q. What things?

A. His household furniture and horses, or whatever it was, to the amount of $600.

Q. His household property?

A. I don't recollect what it was.

Q. You certainly cannot forget a transaction of so recent a date and such unusual character so soon?

By the Court:

Q. Do you know anything more about it than than you were credited on the books in your account with the Pompton Steel Works with $600; do you know anything more about it than that?

A. No, sir.

Q. You do not know what you got for the $600, except the fact that it was credited on the books; did you get title to the property; was it conveyed to you?

A. I understand it that way.

Q. Was the property sold at sheriff's sale?

A. No, sir; I released it.

Q. You released your levy? A. Yes, sir.

Q. Upon your being credited with that $600 upon the books of the Pompton Steel Works?

A. Yes, sir.

Further cross-examination:

Q. Is that what you say, that there was a levy made? A. That's what I understood.

Q. Did you make any personal inquiry into the matter? A. No, sir.

Q. Who did you enquire from, if at all?

A. Well, I released the sheriff; he had a levy on the goods, and by Mr. Ludlum giving him a list of those things which amounted to about $600 I released it.

Q. Did he make an assignment of those goods to you? A. Yes, sir; I think so.

Q. Well, did you get them? A. No, sir.

Q. You left them in Mr. Ludlum's possession?

A. Yes, sir.

Q. And so the things were sold to you for $600, and you have ever since then allowed them to remain in Mr. Ludlum's possession?

A. Yes, sir.

Q. That's the way of it? A. Yes, sir.

Q. Now do you know what you levied on?

A. No, I do not.

Q. Was it his household furniture?

A. It was everything he had that was personal property.

Q. All his personal property that he had?

A. Yes, sir.

Q. Have you even been in his house?

A. Yes, sir.

Q. He has got a very large house, has he not?

A. Yes, sir.

Q. Filled with valuable furniture, is it not?

A. I cannot say about that.

Q. Is it not very handsomely furnished?

A. It is not very handsomely furnished down stairs.

By the COURT: I understand the witness to say, in the first place, that he released his levy on being credited with $600, on the books of the Pompton Steel Works; I think he also said that the property levied on had been transferred to him by Mr. Ludlum? A. Yes, sir.

Q. Was there any writing in relation to that; was there a written transfer of the property made to you?

A. I think there was, but I have not seen it.

Further cross-examination:

Q. Who has got that; did you leave it with Mr. Ludlum? A. Yes, sir.

Q. And you think this assignment embraces all his personal property? A. Yes, sir.

By THE COURT:

Q. Then you understood from Mr. Ludlum that the property had been sold to you in payment of $600 of your claim or judgment against Mr. Ludlum; you then held the property for that $600?

A. Yes, sir.

Q. Now you would not have been entitled to any credit on the books if you had the property; now what was the object of the credit on the books; did you sell the property to anybody?

A. Well, I got $600 in value.

Q. Is there any credit on the books?

A. I did not see it put down, but Mr. Ludlum can tell you about that.

Further direct-examination:

Q. This arrangement was all made between you and Mr. Ludlum, was not it? A. Yes, sir.

Q. Did you consult the Sheriff in reference to it at all? A. Yes, sir.

Q. The it was made between you and Mr. Lud-?um and the Sheriff?

A. Mr. Ludlum was not there.

Q. Then who made the arrangement; you and the Sheriff or who?

A. After I saw the Sheriff I saw Mr. Ludlum.

Q. What did you tell the Sheriff?

A. I do not recollect; it is in writing whatever it is.

Q. Cannot you recollect what you told him?

A. No, sir.

Q. What did you tell Mr. Ludlum?

A. The thing is mixed up somewhat in my mind.

Q. Well, see if you cannot unravel it?

A. (After consideration).

Q. Well, now has your recollection been cleared up?

A. I am not very clear about it; I can tell you just how I recollect it; the Sheriff went there and Mr. Ludlum was not home and I do not know whether any one was sick in the family, or not, but I was not willing for him to go up into the house and make a levy, but he made a levy, and I do not know what he levied on and I released him; Mr. Ludlum gave him the list of all the things he had, the property to be levied on, which property he calculated amounted to $600.

Q. Did you give him a release? A. Yes, sir.

Q. Was that release in writing?

A. I don't recollect; I think it was; Mr. Ludlum can tell you.

By the COURT:

Q. What did you get for your $600?

A. Well, I understand that these things that were mentioned over I got.

Q. They were to be your property?

A. They was valued at $600, and I supposed or I understood that he was to give me credit on the books for $600.

By Mr. EMERY:

Q. $600 in that property or in money?

A. Well, it was money, I suppose, if he gave me credit for it.

Further direct examination;

Q. You said before that he assigned those things to you?

A. Yes, sir; and then it was I thought the value of it would be $600.

Q. Did you fix that value or did he?

A. I fixed it.

Q. Did you look at the goods?

A. We talked it over together.

Q. Did you look at the goods?

A. I knowed what they were.

Q. Did you look at them?

A. No, sir; not at the time.

Q. What were they?

A. They were the goods in the house and horses; now, that's all the recollection I have.

Q. What else? A. That's all I recall.

Q. Well, you say they were goods in the house and horses; and what else were there?

A. That's all.

Q. Didn't he have anything else?

A. Not as I know of.

Q. Do you know where that release is?

A. No, sir.

Q. You gave that to Mr. Ludlum, did you?

A. I think so; yes, sir.
Q. Was it under seal? A. I don't know.
Q. Who drew it?
A. The release from the sheriff, you mean?
Q. No; you say you gave him one, and I want to know who drew it?
A. I don't know that there was any release in writing.
Q. You have just said there was?
A. I didn't understand your question then.
Q. Was there any writing?
A. I didn't see any writing.
By the COURT:
Q. Did you sign any papers in connection with that matter at all?
A. I signed a paper to the Sheriff.
Q. You released the Sheriff? A. Yes, sir.

Further Cross:

Q. On what basis do you think your services were worth $5,000 a year? A. Why, for the work I did.
Q. How did you get at that amount; you might say $6,000 or $7,000? A. I say not less than $5,000.
Q. Do you think they were worth more?
A. Yes, sir.
Q. How much more?
A. I think if I had been paid all I was worth I would have got $6,000 or $8,000 a year.
Q. On what basis do you make that statement?
A. On the basis that my work was worth that.
Q. Is that all you have to go by? Did you and Mr. Ludlum talk this matter over before this trial?
A. No, sir.
Q. Haven't you talked with Mr. Ludlum in reference to it? A. No sir, not about this trial.
Q. No; but in reference to what your services were worth? A. Yes, sir.
Q. When? A. Years ago.
Q. Haven't you talked it over with him since your other suit was decided? A. No, sir.

Q. Not at all? A. No, sir.

Q. Have you not said a word to him about it?

A. No, sir.

Q. How is it that you have arrived at exactly the same figures?

A. I don't know what figures he arrives at.

Q. He says $500 a month.

A. Well, that would be $6,000.

Q. Well, you say 6 or 7 thousand dollars. Now I want to know how you get it? Have you got it simply as the result of your conversation with him, or not? A. No, sir.

Q. Then in what way did you get at it?

A. I got at it because I really think my services were worth more, or not less than $5,000 a year.

Q. Well, that's not explaining how you got at it. How was that result arrived at? How did you come to that conclusion?

A. I think my services were worth that.

Q. Is that all you can say on that subject?

A. That's all I can say.

(Petitioner rests with the right to call Mr. JAS. R. THOMPSON.)

By MR. LUDLUM.—Inasmuch as my name has been brought so prominently forward in the matter, as having been in collusion with Mr. McElroy, I feel that in justice to myself I would like to make, before the case closes, one or two statements, with the permission of the Court, if such a course is proper.)

BY THE COURT: I can hear nothing about this case but the evidence.

By Mr. LUDLUM: I don't know how it can be done. I have not talked with Mr McElroy's counsel in the matter and I will just have to refer to Mr. McCarter and ask his opinion in the matter.

By Mr. STEVENS: I would like to ask Mr. Ludlum one or two questions after we adjourn.

By the Court: Do you mean on cross-examination? Mr. S.: Yes, sir.

By the Court: You had better do it now.

By Mr. Stevens: Well, Mr. Ludlum, just take the stand.

James Ludlum, a witness produced on the part of the petitioner, having been sworn, is re-called for

Further cross-examination by Mr. Stevens:

Q. Do you know Martin John Ryerson?

A. Yes, sir.

Q. Where does he live? A. In Bloomingdale.

Q. Have you ever had any conversation with him in reference to the litigation connected with the winding up of the partnership of Horner & Co.?

A. I think I have.

Recess.

Q. Do you remember when Mrs. Buckingham filed a bill against you to wind up the partnership of Horner & Co.? A. Yes, sir.

Q. When was that? A. In 1874.

Q. Give me the month?

A. I can't. I think it was in August or September.

Q. Do you remember very shortly after that time having had a conversation with Martin John Ryerson, in the course of which, in response to a question by him as to why you did not settle up the affairs of the partnership, you said that you would spend all that you were worth and make Buckingham spend all that he was worth before you would propose settling—that Mr. Buckingham had commenced the fight and that you were going to fight it out.

(Objected to.)

By Mr. Stevens: My object is to show this—the estate is a creditor of Mr. Ludlum to the extent of something like $100,000. The estate itself is now almost reduced to nothing

and so the receiver represents, practically, Mrs. Buckingham. Now I propose to show the feeling of hostility which this witness has against the person Mr. Kirkpatrick represents, namely, Mrs. Buckingham.

Mr. Emery replied urging that the Receiver did not represent only Mrs. Buckingham, but the petitioner in this case and also other of the creditors.

BY THE COURT: As the matter now stands I must sustain the objection. I overrule your objection.

Petitioner rests.

JAMES LUDLUM, a witness produced on the part of the defendants, having been duly sworn, according to law, is recalled.

Direct examination by JUDGE STEVENS:

BY JUDGE STEVENS: I desire to offer in evidence the decree made in a cause in which Alice Buckingham is complainant and James Ludlum is defendant, for the purpose of showing what the indebtedness of Mr. Ludlum to the estate is.

(Objected to. Here followed arguments of counsel, in which Judge Stevens read one or two letters, which will be found further on).

BY THE COURT: The question is a novel one. I think the better and shorter way would be to let Judge Stevens put in all his evidence, and I will consider the matter hereafter. I think the judgement is of trifling importance, and only upon the question of the amount of this claim. It is not conclusive, and has no binding force upon the Receiver, but that it is a circumstance in the case which may be entitled to have some weight in determining the amount of his compensation—what will be a reasonable compensation to him for the labor and skill that he gave to the firm. I do not think it a circumstance of much importance though. I think the fact ought to be admitted that the coun-

sel of the respondent wanted to plead payment, the statute of limitations. Proper pleas of that character to the claim of Mr. McElroy and Mr. Ludlum, for the reasons stated in his letter, refused to plead them, because he did not think it was honest to do so. I think that fact ought to be given in evidence.

By Mr. Emery: I do not know anything about this letter, except that I heard Judge Stevens state something of that kind.

By Judge Stevens: I now offer in evidence this decree with the view of showing—(interrupted).

By the Court: Go on with your proofs in regard to the judgment in the first place.

Q. Mr. Ludlum, who is your attorney in defending the suit of Joseph W. McElroy against James Ludlum, surviving partner, in the Supreme Court?

A. I employed Robert L. Laurence. (The witness supplemented his answer with an explanatory remark, which, by order of the Court, was stricken out.)

By Judge Stevens: I desire to ask you to confine your answer simply to my questions.

By the Court: The latter part of that answer was clearly not responsive and must be stricken out.

Q. When did you employ Mr. Laurence, in what stage of the case?

By the Court: Before or after the interlocutory judgment was entered against you?

By the Witness: Wont you be kind enough to repeat the other question which I answered?

The Stenographer read as follows: Mr. Ludlum, who is your attorney in defending the suit of Joseph W. McElroy against James Ludlum surviving partner in the Supreme Court?

By the Witness: In the first place I spoke to Messrs. McCarter & Keen in reference to it.

Further direct:

Q. Did they enter an appearance for you?

A. Mr. McCarter gave me to understand that I had a certain number of days—(interrupted.)

Q. I don't want you to answer anything except what I ask you; did Mr. McCarter enter an appearance for you?

(Objected to and withdrawn.)

Q. Did you employ McCarter & Keen in the first instance to defend this suit?

A. Yes, sir; I spoke to them and expected them to do so.

Q. Did they continue your attorneys in that case? A. No, sir.

Q. Who became your attorney?

A. Robert L. Laurence, finally.

Q. What did you instruct Mr. Laurence to do?

A. To advise you and your clients of every step in the case; to give you every opportunity to assist him in the suit which you desired to adopt, and to defend it in all proper ways.

By Judge Stevens to Mr. Laurence. Will you produce the letter which I requested you to produce?

By Mr. Laurence: (Producing the letter.) I would state to the Court that I do this with the consent of Mr. Ludlum.

Q. Was that judgment interlocutory opened?

A. Yes, sir.

Q. Did Mr. Laurence submit to you certain pleas which he said had been prepared by himself for the opening of the interlocutory judgment?

A. Yes, sir.

Q. Did you in answer to the letter enclosing those pleas write him this letter (handing witness a letter)? A. I did.

Q. Did you receive from Mr. Laurence a letter which I wrote to him?

By the Witness: Let me see that first letter again please (letter again shown witness); I wrote

that answer in relation to a note of yours which he submitted and to the proposition which he said you made to him.

Q. Did you receive from Mr. Laurence a letter which I wrote to him on the 18th of April, 1881, to this purport?

"ROBERT L. LAURENCE, Esq.

"DEAR SIR:

"Your note in reference to the McElroy suit is "at hand.

"In view of the fact that Mr. Ludlum has delib- "erately refused to plead in the manner I advised, "it seems to me somewhat extraordinary that I "should be asked to conduct his defence or take "part in so doing. Any judgment which he may "allow McElroy to obtain against him will, as I "understand the matter, be purely personal, in no "wise effecting Mrs. Buckingham's interest, or "that of James Horner's estate.

"Yours truly,

"F. W. STEVENS."

Did you receive a letter of that purport?

A. I either saw it or received it, one of the two.

Q. Did you in answer to that letter write me this on the 22d of April, 1881 (handing witness a letter)?

A. Yes, sir; I think I addressed you personally that time.

By Mr. STEVENS: This is the letter; I will read it:

"POMPTON, April 22d, 1881.

"F. W. STEVENS, Esq.:

"DEAR SIR:

"Mr. Laurence has shown me your letter "wherein you expressed surprise at my asking "your assistance in the McElroy case, when I had "declined to plead as you suggested. I think you "mistake my meaning and motives, my only ob-

"ject in accepting your assistance, 'if you chose to "render it at your client's expense,' was to give "you and them all possible opportunity to see and "know my action and evidence.

"I hope you did not get the idea from my first "overture to you (made with the above object), "that I intended to combine with your clients to "rob a man under the shadow of the Statute of "Limitations, who had trusted J. Horner & Co., "That may be legal, but in my humble judgment "would be dishonest, false and indecent.

"I mean to defend that suit just as far as is right "and not farther, and to give you a chance to see "that I do it.

"Yours truly,

"JAMES LUDLUM.

By Judge STEVENS: I desire to offer in this connection in evidence a letter of Mr. Laurence of the date of January 3d, 1881; I suppose Mr. Emory won't want me to call Mr. Laurence to prove that, and I also offer another letter.

By Judge STEVENS: To Mr. Laurence. You wrote these letters, didn't you, Mr. Laurence?

By Mr. LAURENCE: Yes, sir.

By Judge STEVENS: I will read them.

"JANUARY 3d, 1881.

"Dear Sir:

"On Friday last I filed in the McElroy *v.* Ludlum case a plea of the general issue, and have served "upon Mr. Emory a copy with notice of the filing.

"In regard to the pleas of payment and the stat- "ute of limitations, which I also prepared and "submitted to Mr. Ludlum with explanations as to "their effect, the enclosed copy of the letter re- "ceived from him, which I send you with his con- "sent, will apprise you of his reasons for not "having them put in this case.

Yours truly,

"R. L. LAURENCE.

"POMPTON, December 30th, 1880.

"ROBERT L. LAURENCE Esq.

"Dear Sir:

"Of the two pleas submitted for my signature I "return the one pleading payment and statute of "limitations for the reasons: First, as regards pay- "ment, I will not plead anything that I cannot "swear to; second, as to the statute, I am very "positive that the record of the evidence in the "McElroy case before master Romaine will be used "to stultify me, as also several proceedings in the "Buckingham and Ludlum cases.

"As regards the employment of Mr. Stevens to "assist you will say, that I have desired him, as "Buckingham's counsel, to have full knowledge "of the case and all I did as it progressed, and am "perfectly willing to have him act with you in the "interests of his client, but not on my account "nor at my expense.

"Let that be distinctly understood, if anything "is said, for I prefer to deal frankly with him.

Yours truly,

JAMES LUDLUM, Survivor.

I also read this letter:

"Dear Sir: The case of McElroy *v.* Ludlum has "been noticed for trial at the next term of the Pas- "saic Circuit. Mr. Ludlum wished me to notify "you of this and to say that he is perfectly willing "that Mr. Buckingham should take part in the "trial of the case if he chose to do so.

Yours truly,

"F. W. STEVENS. R. L. LAURENCE."

By Mr. LAURENCE: If your Honor will allow me to make a statement; the reason I do not care to leave the court room is in view of the evidence being put in. Mr. Ludlum would like me, if your Honor will permit it, to take the stand and testify

as to what instructions he gave me in relation to that suit, and I am perfectly willing to do so, if your Honor thinks it proper.

By the COURT: This is a matter that the counsel in the case must settle.

By Mr. LUDLUM: I only suggested it in view of the evidence which was being put in, and because Mr. Laurence was going home.

By the COURT: It is not necessary; this is no place for personal explanations.

By Judge STEVENS: Then I desire to offer all these letters in evidence.

By Mr. EMORY: Of course they are taken subject to our objection.

Q. Did you write a letter on or about July 23d, 1880, to Mr. Kirkpatrick, the present Receiver of the firm? A. Yes, sir; I did.

Judge STEVENS showed Mr. Emory the letter.

By Mr. EMORY: This letter is in relation to Mr. Ludlum not agreeing to some proposition of the Receiver.

By Mr. EMORY: Was that in writing?

A. Well, sir, without further thought on the subject, I do not know what it refers to, but I simply know I wrote that letter; if I could look at it I will probably remember what it is in reference to. (Said letter was handed back to Mr. Ludlum).

By the WITNESS: I now know to what it refers; I think it was a personal application to me by Mr. Kirkpatrick.

Mr. STEVENS then read the said letter, as follows:

"POMPTON, July 23, 1880.

"ANDREW KIRKPATRICK,

"Receiver:

"Mr. McElroy has advised me that after "careful consideration and counsel, he has con- "cluded to further prosecute his claim. With my "knowledge of the justice of his claim and that it

"never could have been placed in jeopardy but for "his unfailing trust in my assurances that he was "safe in the protection of the Court, I cannot will- "ingly assent to your proposition of July 13th. "It is too bad that a man's integrity and perfect "faith should cause his ruin in that way. Mr. "Dodd has given me his word that he would not "allow any encroachment upon Mr. McElroy's col- "lateral deposit until he has exhausted his rem- "edy. I could make no appointment to meet Mr. "McCarter until next Monday, therefore, I did not "again call on him. He may advise me that I am "wrong, and as I feel but too strongly the injus- "tice which has been done (through my care- "lessness, if you please) to trust my own judg- "ment, I may change my mind when I can talk "with Mr. McCarter.

"Yours truly,

"JAMES LUDLUM."

Q. Now, Mr. Ludlum, the reference here to the proposition of July 13th; what was that proposition?

A. The proposition was that I should hand over to him the United States Government bonds which Mr. McElroy had deposited with me in this matter.

Q. Did you subsequently turn over those bonds pursuant to the order of the Court directing you to do so? A. Yes, sir.

By Mr. STEVENS: I desire to offer this letter in evidence (referring to letter).

(Objected to as irrelevant.)

Q. Did you, about the time of handing over those bonds to Mr. Kirkpatrick, hand him this paper (handing witness a paper)?

A. I don't remember, sir, whether I handed it to Mr. Kirkpatrick or not.

Q. Is that your signature?

A. Yes, that is my signature.

Q. Didn't you hand it to Mr. Kirkpatrick at some time?

A. I don't remember, sir, whether I handed it to Mr. Kirkpatrick or not.

Mr. STEVENS: I offer it in evidence.

The WITNESS: The only recollection I have to that paper—shall I state?

Mr. STEVENS: (Reading said paper) "For the information of whom it may concern, I hereby state, etc."

(Counsel read paper.)

The WITNESS: I will now say that I deposited that paper with the bonds, in the State National Bank here, for the information of whom it may concern.

Mr. EMERY: On what day.

A. At the time I deposited the bonds.

Further direct:

Q. Look at the paper and see?

A. March 10th, 1877.

Q. Mr. Ludlum, I will call your attention to your answer on page 39, or what is called the "Main Case," page 38 and 39. "Defendant is utterly unable to state the present gross value of the partnership assets, but as near as he can state the same it ought to reach the sum of $500,000 if carefully managed and the market is favorable. Defendant states that at the death of Mr. Horner the liabilities of the firm, other than the mortgage of $125,000, amounted to about $60,000, as near as defendant can state, and that the books contained full accounts thereof; that previous to July 15, 1874, and after said Horner's death, he had reduced said liabilities to about $15,000, and that since that time he had reduced them to about $4,000 or $5,000, and that defendant cannot state the assets of the steel and file works separately as the accounts and profits are in a measure intermingled. (Counsel read.)

(Objected to. Admitted.)

By the WITNESS: May I make a suggestion? I have had no interview or understanding at all, and the answers to these questions would do me very gross injustice unless I have a full opportunity for explanation; either now, or at some time.

The COURT: You will be afforded a full opportunity to explain any answer you may make.

Q. Was that a part of your answer in that case?

A. I believe it was, sir.

Q. I call your attention to a letter written by you on July 15, 1874, to Mrs. Buckingham, which was appended as Exhibit D. to your answer; will you please state whether you wrote that letter?

A. Yes, sir; I did.

Judge STEVENS: The letter was lost, but I want to just read this part of the letter. "Mrs. Alice Buckingham, Executrix. I have to advise you that the assets of J. Horner & Co., at Elizabethport and Pompton, etc." (Counsel read letter.)

Q. (Mr. LUDLUM): What is your financial condition now, and what has it been ever since this judgment or decree was rendered against you, adjudging that you owed the firm, $73,975.47?

A. My financial condition will depend entirely upon the decision of the Court in Chancery, on the give and take contract. Since I became connected with the firm of J. Horner & Co., I never was interested in, or owned a dollar, except as it was derived from that company, and as is shown upon the books of the company as they now are.

Q. So that you have no property outside of your interest in the estate?

A. Every dollar I have in the world is involved in this litigation.

Q. Has that been so since 1874?

A. It has, yes, sir.

Q. Ever since the death of Mr. Horner?

A. Yes, and is so now.

Q. What assets of the estate did you turn over to Mr. Kirkpatrick?

A. I turned over the books, and the cash in hand and Mr. McElroy's bonds.

Q. What was the account of the cash on hand?

A. I don't remember.

Q. Was it $1,000? A. I think not, sir.

Q. What was the amount of the bonds?

A. $9,500, par value.

Q. Was there any assets of the estate remaining in your hands, or elsewhere at the time you turned over the bonds and cash to Mr. Kirkpatrick?

A. Nothing that I remember of.

Q. Do you recollect the Master's sale of personal property, in the fall of 1876—personal property of the estate? A. I do.

Q. Was that personal property sold by Master Ricord, the same as that which is included by you in the steel works inventory, made shortly after the death of Mr. Horner?

A. It included a good many other things, besides what was in the steel works inventory.

Q. Did it include all the property mentioned in the steel works inventory; or nearly all?

A. I think it did.

Q. And other things besides?

A. Yes, sir; I think so.

Q. What other things?

A. I don't remember. Farm produce, and store, and file works, etc.

Q. Worth how much? A. I don't know.

Q. What did you value the property in the steel works at, when you gave your evidence in the suit brought by Joseph W. McElroy to recover one-eighth of the profits of the firm?

A. I don't remember, sir.

Q. I will call your attention, for the purpose of refreshing your memory, to the printed copy of the steel works inventory?

By the Court: What page is that?

Mr. Stevens: This brings up the question again,

that was brought up before, when I offered the decree in evidence. I desire to show this. That this claim which Mr. McElroy now makes was concocted between himself and Mr. Ludlum, subsequent to the death of James Horner, and I propose to show that Mr. Ludlum formed a purpose, so far as that purpose can be seen by his acts, which strikes me are perfectly unanswerable evidence of that purpose. I propose to show that Mr. Ludlum's purpose was to prevent, in every way he could, the heirs of James Horner from getting any part of his property. I propose to show that by the declarations which Mr. Ludlum made, both to Mr. Ryerson and to Mr. Buckingham himself, and also by his conduct and acts in connection with Mr. McElroy. Now, I propose, in the first place, to show this: That Mr. Ludlum allowed the personal property of the firm to be sold for taxes, contrary to the direction of this Court, and that Mr. McElroy bought in the property of the firm at a sale, far below its value, at a tax sale.

THE COURT: How does that tend to show that Mr. McElroy at that time didn't have a legal claim against this firm?

JUDGE STEVENS: It only shows it circumstantially. My idea is that Mr. McElroy and Mr. Ludlum formed the purpose of setting up this claim, after the death of Mr. Horner, for the purpose, on Mr. Ludlum's part, of preventing Mrs. Buckingham from getting any of the assets of this firm. Of course I cannot show that directly, but I can show circumstances which tend unmistakably in that direction.

The Court overruled the offer.

Q. State whether you have ever paid any part of the decree rendered against you for $73,000?

A. I was never asked, or ordered to pay anything; but was distinctly advised not to pay anything until the settlement of the estate.

Q. Have you paid? A. Never.

Q. Have you any property with which to pay?

A. No property excepting what is in the estate, and my claims against Mr. and Mrs. Buckingham involved in that give and take contract. If that is decided in my favor, I shall be worth $75,000 or $80,000.

Q. That is the case which has recently been decided, and the Court has made a decree dismissing your bill?

A. I was not aware of that, sir, at all.

Q. Will you please state whether, at the time when you transferred the assets of the estate to Mr. Kirkpatrick, there were any debts which the estate owed, except this alleged debt to Mr. McElroy.

A. I cannot state positively, sir, without further thought.

Q. Do you know of any? A. Not at present.

Q. Didn't you while you were receiver; pay all the debts except this?

A. I believe they were all paid except this, and I would have paid this but for the charge of collusion and fraud which was made against me.

Counsel for Mrs. Buckingham and the receiver now states that he will cross-examine Mr. Ludlum on the subject of his hostility to Mr. and Mrs. Buckingham.

Cross-examined by Mr. Stevens:

Q. Have you not expressed feelings of hostility, Mr. Ludlum, towards Mrs. Buckingham and her husband to various persons.

(Objected to.)

Judge Stevens: I put that general question first, and propose to follow it up with special questions. I will withdraw that question, if it is objected to.

(Question withdrawn.)

The Court: The proper question is whether he at this time entertains feelings of hostility towards Mrs. Buckingham?

Q. How is that, Mr. Ludlum?

A. I do not entertain any other feeling toward Mrs. Buckingham than one of regret and sorrow that she is in the position she is, sir.

Q. Haven't you said to Mr. Martin, John Ryerson, on the cars, in response—(interrupted.)

MR. EMERY: When?

Q. Shortly after the bill was filed against you by Mrs. Buckingham, in September or August, 1874; in response to the question which Mr. Ryerson put to you, "Why you didn't settle up your affairs, as business men ought to do," that you would spend all you were worth, and make Buckingham spend all he wasworth, before you would propose settling; that Mr. Buckingham had commenced the fight, and that you were going to fight it out?

(Objected to. Admitted).

THE COURT: Answer that question, Mr. Ludlum?

(The stenographer read the question.)

A. I believe I did not. I am further confirmed in that belief by the fact that prior to the day on which Mr. Ryerson swears in another case that I made such a statement to him, I had, a few days previously, made a proposition to Mr. Buckingham for the settlement of the whole difficulty.

Q. Did not you use words to that effect?

A. I did not. I can tell you what I did say, if you will hear.

By the COURT: Q. You have a right to state that.

Q. Shall I state it now.

Q. If you so desire?

A. Mr. Ryerson, when referring to a previous conversation, asked me why I did not make some proposition to Mr. Buckingham for a settlement. I told him the objection to dealing with Mr. Buckingham was that he didn't know what he wanted, and if I should offer him a hundred thousand dollars he would want two; and if I should offer him a million, he would want two millions. I didn't allude to the proposition—the give or take proposi-

tion—which I had made on April 26. But this conversation, as testified to by Mr. Ryerson, was on the 6th of May; therefore I know I did not make any such statement as that.

Further cross-examination:

Q. Didn't you say to Mr. Buckingham, in the winter of 1874 and '5, in response to an inquiry on his part why you would not settle up the affairs of the firm, that you were not such a fool—(interrupted.)

By Mr. Buckingham: No, that is not it.

Judge Stevens: Well, what is it?

Q. In response to an inquiry on his part why you would not work up the steel then on hand, that you were not fool enough to work it up for the benefit of Horner's heirs?

(Objected to.)

A. No, sir; but I can tell you what was said between us; we had that testimony all over, in Mr. Harris' office here, in another case.

The Court: State what was said.

A. Mr. Buckingham asked me why I did not work it up, and I said something or other about working it up at the time when he had made a proposition before Mr. Dodd, to have me as receiver to work it up, and in my answer I have stated the reasons why it could not be done; because the concern was deprived of all its ready means for doing business by the action of the Chancery cause, which had been begun against me; that they had no money, neither money nor credit, and that under such circumstances it could not be done.

The Court: Mr. Ludlum desired to make some explanations; he can offer them now, or wait until Mr. Emery has finished his cross-examination.

Cross-examined by Mr. Emery:

Q. You said something about the date of the give and take contract; what was that date?

A. April 26th.

Q. What year? A. 1875.

Q. When both parties concerned in the estate made offers on which they agreed for settlement?

A. Well, I had made a proposition at that time, when this conversation with Ryerson was referred to, which was under consideration and was afterwards accepted by them.

Q. In April, 1875, a proposition was made of settlement? A. Yes, sir.

Q. Which was satisfactory to both parties at the time it was signed? A. Yes, sir.

Q. And that was after this alleged conversation with Mr. Buckingham too, was it not?

A. Yes, sir.

By Mr. Ludlum: I made a statement in my answer on the main case, on page 39, as to the debts of the concern, under these circumstances: that a long bill in Chancery had been handed to me, containing a hundred pages, or more, which I was told I had to answer in seven days, and to the best of my knowledge and belief I answered every question in it. The state of the McElroy case did not occur to me at the time it was done. In my letter of July 13th I was actively engaged in making up an inventory, and in my letter of July 13th, already referred to, I think I said in that, as I did in every other statement, "errors and omissions excepted." In my first report to the Court, shortly after, I included the McElroy claim, and made a statement as to why I had forgotten it.

Q. About what time was that first report filed?

A. In December.

Q. Of 1874? A. Yes, sir.

Q. You were appointed Receiver in November?

A. November 17th, and my first statement of December 5th, contained the fact that Mr. McElroy had a disputed claim, and I applied to the Court to know what I ought to do under the circumstan-

ces, and it was my own proposition made to Mr. Dodd, that the Mr. McElroy claim should not be settled by me, because, after the time I made my first report, they charged me with fraud in reference to it, and therefore I avoided, distinctly, any attempts to settle it personally.

By Mr. EMORY: Q. There was no rule, or notice given to creditors to bring in their claims in the suit—none appears on the record?

Mr. STEVENS: The record will speak for itself.

A. No, sir; there was no order at all.

By Mr. LUDLUM: I wish to state that Mr. McElroy delayed making any legal claim upon the company, at my request, as Receiver, I telling him that the matter would receive the attention of the Court at the proper time; when he finally made his legal claim, the first thing I did was to ask Mr. Kirkpatrick to defend it, and he refused; then I asked McCarter & Keene, and I understood from them that I had sixty days to answer; I wish to put myself right on the record; and then I applied to have the case opened, and the answer in that letter which I sent, was to a letter from Mr. Stevens, through my counsel, Mr. Laurence, stating to me that he, Mr. Stevens, was willing to act in the matter, providing I would pay him, and that is the meaning of my answer in that letter, that I was unwilling to pay him.

By Judge STEVENS: I object to the last part of that answer, because the letter will speak for itself; the witness puts a construction on the letter which it will not possibly bear.

The WITNESS: Mr. Laurence will swear to that.

Judge STEVENS: I am not aware that I ever said such a thing as that, and I don't think I did.

The COURT: That may all be, but I may account for Mr. Ludlum's conduct; he has the right to say that you used Mr. Laurence as a means of communication with him, and if Mr. Laurence, without reporting to you, reported to Mr. Ludlum that

you would not defend this case without he paid you, I think Mr. Ludlum has a right to state that, because it is a statement of your agent.

After some further discussion, Mr. Stevens requested to have his exception noted on the record.

JUDGE STEVENS: Q. This statement you have last volunteered has been volunteered by you, and is not in response to any question asked you by counsel on either side.

A. I made a minute in reference to it, as you were asking me questions, in order that I might make my answer to your question fully.

Q. That is all.

JOHN MARTIN RYERSON, a witness produced on the part of the aforesaid defendants, having been duly sworn, deposeth and saith:

Q. Where do you live?

A. Bloomingdale, Passaic County, New Jersey.

Q. What is your business?

A. Well, I am a manufacturer of iron, farming, etc.

Q. Do you know Mr. Ludlum? A. Yes, sir.

Q. Did you have any conversation with him in the cars, shortly after the month of September, 1874?

A. Yes, sir.

Q. Will you please state what the conversation was, so far as it related to the late firm of J. Horner & Co?

A. We were sitting together in the car, coming up from Paterson, and I asked him why he and Mr. Buckingham did not settle their affairs—

(Objected to. Admitted).

Q. Well?

A. He said he would spend all he was worth, and would make Buckingham spend all he had got, before he would make a proposition of settlement.

Q. Was anything said about Buckingham beginning the fight?

A. Yes, sir; he made that remark also, that he would fight it out?

Q. When was this?

A. On the 6th of May, 1875, I think.

Cross-examined by Mr. EMERY:

Q. How do you know it was the 6th of May, 1875?

A. Because I noted it down at the time.

Q. On the day? A. Yes, sir.

Q. Did you write down the conversation at the time? A. Shortly after.

Q. When did you put the date down of May 6th?

A. At the time it occurred; the next day, probably.

Q. Is that your habit with conversations, to put them down? A. No, sir.

Q. Did you get into conversation for the purpose of getting information about the estate?

A. No, sir.

Q. To use as evidence, or anything of that kind?

A. No, sir; I didn't think of any such thing.

Q. Have you the book here in which you wrote it?

A. I have a memorandum book here, which I copied it in, to be sure of the day; this is not the original entry, because that was made some years ago.

Q. What became of that?

A. Well, I saw it last at the time previous to the examination before the Master.

Q. How long ago was that?

A. Last fall some time—in September, I think.

Q. Where is that?

A. I left it home in my drawer; I have not seen it since.

Q. What have you entered in that book (referring to book in witness' hand)?

A. A mere memorandum from the memorandum book of last year.

Q. Let me see it? A. Here it is.

Q. This is a book of this year?

A. Yes, sir; I copied it in so as to know just when the date was.

Q. When did you copy it off?

A. Yesterday morning, I think.

Q. From the memorandum?

A. From the memorandum book of last year.

Q. Of 1881? A. Yes, sir.

Q. Have you been carrying that on along for years?

A. After I received the subpœna I thought it necessary to know it at another time.

Q. When did you get a subpœna about this matter? A. Day before yesterday.

Q. How did you come to mark it down on May 6th, 1875, in your diary of 1881?

A. I wanted to know the time it occurred precisely, so as not to be mistaken.

Q. When did you make that entry on your diary of 1881; when you bought the diary in the early part of the year?

A. No, sir; I copied that from a paper that I made it on about the time it occurred, after receiving the subpœna to attend the examination before the Master.

Q. That was last year?

A. That was in September, I think.

Q. But, then, you turned back and wrote it in May?

A. In May—I wrote it day before yesterday.

Q. But you wrote it under the head of May 6th, 1875; now you wrote it the day before yesterday; but my inquiry is about your writing it in the diary of 1881?

A. I wrote that at the time I received the subpœna, in September.

Q. Did you carry the memorandum in other diaries? A. Yes, sir.

Q. This says that on that date you had a conversation in relation to the Horner estate?

A. Yes, sir.

Q That is all that memorandum is?

A. Yes, sir.

Q. Have you a memorandum of any other conversation with Mr. Ludlum? A. No, sir.

Q. Or any other persons interested in the estate?

A. No, sir.

Q. With Mr. Buckingham? A. No, sir.

Q. That is the only one? A. Yes, sir,

Redirect Examination:

Q. Why did you make a memorandum in this particular case?

A. I thought it was an unbecoming remark for a receiver to make at the time.

Q. You thought that was out of the common course?

A. Yes, sir; and was so unbecoming for a receiver to make of an estate that he ought to be settling up.

Re-cross Examination:

Q. Are you on friendly terms with Mr. Ludlum?

A. I used to be.

Q. That don't answer my question?

A. Latterly we haven't had so much intercourse.

Q. Haven't you had some difficulty in your township or your town affairs, between Mr. Ludlum and yourself; some dispute during the last ten years?

A. Well, what do I understand you to mean by dispute?

A. I mean some controversy in which you took one side pretty vigorously, and Mr. Ludlum the other; were not there some claims in reference to the Montclair bonds? don't you know that Mr. Ludlum had charged you that you had not protected the interests of the township in that matter?

A. Mr. Ludlum circulated willful, malicious lies about me.

Q. Wasn't it in relation to your conduct in issuing the Montclair railroad bonds?

A. I cannot tell what his motive was.

Q. Wasn't it in relation to that subject?

A. Yes, sir.

Q. About your conduct in reference to the issuing of the Montclair Railroad Bonds, which were afterwards held against the township?

A. Yes, sir.

Q. And there was a good deal of excitement in the township about that matter, was there not?

A. Yes, sir.

Q. And a good many of the citizens were very much incensed at their issue, were they not, and there was difficulty with the gentlemen who had charge of them?

A. In consequence of the lies circulated by Mr. Ludlum about me, it caused a good deal of feeling.

Q. You felt yourself to be one of the objects of the ill feeling?

A. Yes, sir; I was one of the commissioners.

Q. That issued the bonds?

A. I was one of the commissioners to go round and get people to sign their names, to have the town bonded.

Q. You were concerned in the proceedings which gave rise to the town being bonded?

A. Yes, sir.

THE COURT: Q. At the time that the conversation occurred between Mr. Ludlum and you, were your relations friendly, or otherwise?

A. Friendly, then.

Q. No difficulty had existed between you before that time?

A. No, sir; nothing of any consequence.

Q. You say, not of any consequence.

A. Well, sometimes we have had little difficulties in settling accounts; he never would stick to his agreements, but there was nothing of any serious nature.

MR. EMERY: Q. Was not this difficulty in

relation to the Montclair Bonds, in 1870? just tax your memory now, and see.

A. Well, I can't tell, it is so long ago.

THE COURT: Q. Did the difficulty about the bonds occur before 1875?

A. I think more of it occurred after that.

Q. Had there been difficulty about the Montclair Bonds, prior to May, 1875?

A. No; I don't think there had been any difficulty about it; things all went on smoothly as long as the Montclair Railroad Company paid the interest on the bonds; but after they defaulted, there was difficulty.

BY MR. EMERY; Q. Didn't they default in the year 1874?

A. I can't reccollect.

Q. If they defaulted in 1874, then the difficulty had commenced at the time you had this conversation?

A. No, sir; we were sitting together, talking about matters in general.

JUDGE STEVENS: Q. A perfectly friendly conversation? A. Yes, sir.

Q. No hostility in it? A. Not at all.

JOHN M. BUCKINGHAM, a witness produced on the part of the aforesaid defendant, having been duly sworn, deposeth and saith:

Direct Examination by MR. STEVENS:

Q. You are the husband of Alice Buckingham?

A. I am.

Q. And you were both complainants in the case of "Buckingham vs. Ludlum," for an accounting of the affairs of the partnership of Horner & Co.?

A. We were.

Q. Did you have any conversation with Mr. Ludlum, in reference to working up the finished steel?

A. I did.

Q. When did that conversation occur?

A. In the winter of 1875.

(Objected to.)

Q. Will you tell what you said, and what he said in reply?

A. I told Mr. Ludlum that the parties who had been their customers wanted that stock finished up, if it could be done in the usual way, and that I had told them that if they had it, they must be prepared to pay for it, because the estate was in liquidation, and wanted the proceeds to pay debts with; and that the parties told me that they could pay for it in paper, guaranteed, so that it could be used for that purpose, and then I asked him why in the world he would not work it up and save that property to the estate, and he replied to me, by asking me if I thought he was fool enough to work up that property for the benefit of James Horner's children? I then suggested to him that he ought to work it up for the benefit of his own children; he said he would take care of that, that he would rather that the whole property should be wasted, than that Horner's children should have any of it.

(MR. EMERY: I object to that on the ground that Mr. Ludlum was asked about an entirely different conversation. I object especially to the concluding part of the answer.)

Cross-examined by MR. EMERY:

Q. When was that?

A. In the early winter of 1875?

Q. What do you call the winter of 1875?

A. Beginning in the month of January; I think it was in January.

Q. Of 1875? A. Yes, sir.

Q. And the litigation had been pending between the parties since August, 1874? A. Yes, sir.

Q. And you had got an injunction against Mr. Ludlum's management of the estate, and the appointment of a receiver during that fall?

A. Yes, sir.

Q. And there had been difficulty and high talk between you and Mr. Ludlum in the talk, about the estate and business?

A. Well; we never agreed upon any question, or any business.

Q. That is all.

By Mr. Stevens: I wish to offer in evidence now the decree. I offered it before, but I don't think it has been received; I desire, also, to offer in evidence, the letters which I have produced and read, and also the order opening the interlocutory decree, recovered by Mr. McElroy against Mr. Ludlum.

(Mr. Emery: I object to them on the ground that they are not material or relevant.)

Judge Stevens: As Mr. Emery is to have the liberty of examining Mr. Thompson at a future day, I would like to have the same liberty to examine Mr. Jennings, a partner of Mr. Spalding.

(Said permission was granted.)

Judge Stevens: I also offer the pleadings in the McElroy case, and also the evidence which Mr. Ludlum gave in that case, so far as attention has been called to it.

(Objected to.)

Adjourned.

Transcript of short-hand report of evidence in this cause upon the continuation of the hearing thereof, on Saturday, the 22d day of April, 1882, at the chambers of the vice chancellor at Newark, N. J.

Joseph W. McElroy, a witness produced on the part of the said petioner, having been duly sworn, is recalled for further

Cross Examination, by Judge Stevens:

Q. Will you state particularly what kind of steel

you turned out in your factory from 1868 down to 1874?

A. We turned out tool steel and spring steel of various kinds.

Q. State what kinds?

A. We made spring steel for Hibbard Springs, spring steel for elliptic springs, hoe steel, fork steel and rake steel.

Q. What else did you turn out? A. File steel.

Q. Anything else?

A. That is as far as I can recollect.

Q. What was the kind of steel that you turned out more than any other? A. Spring steel.

Q. Was it necessary to make any exact calculations—mill calculations in refeference to the steel turned out?

A. In what way do you mean to make exact calculations?

Q. Do you understand what mill calculations are?

A. Why every kind of steel I had to be particular about, so as to know what to make it of.

Q. Did you have to go into mathematical calculations in reference to it?

A. I had to go into some calculations.

Q. What sort. A. They were short.

Q. What is that?

A. They were very little calculations I had to go into.

Q. Were you using the patent which was sold?

Objected to and over-ruled, on the ground that Mr. Stevens had only asked permission to recall this witness to examine him as to the kinds of steel manufactured under him as superintendent.

Q. That's all.

JAMES R. THOMPSON, a witness produced on the part of the aforesaid petitioner, having been duly sworn according to law, deposeth and saith.

Direct Examination:—

By Mr. Emery:

Q. You reside in Montclair, Mr. Thompson?

A. Yes, sir.

Q. What business do you carry on?

A. Manufacturer of steel.

Q. At what place? A. Jersey City.

Q. How long have you been engaged in the manufacture of steel? A. Since 1848 I think, sir.

Q. Do you know of a concern called J. Horner & Co? A. Yes, sir.

Q. Where was that carried on?

A. Do you mean their steel business?

Q. Yes?

A. At Pompton, New Jersey, I think, sir.

Q. They had other branches of business which they carried on under that firm name?

A. They had a store in New York, I think.

Q. And also a file works?

A. File works and so forth.

Q. You have you been engaged in business all the time from 1848 up to the present time as a manufacturer of steel?

A. There was an interim, sir, of two or three years.

Q. During what interval?

A. From 1859 to 1861, in which I was not directly engaged in the manufacture of steel; but with that exception I have been for the time specified.

Q. Where are you now engaged in the manufacture? A. At Jersey City.

Q. What works?

A. They are known as the Jersey City Steel Works.

Q. Is it a company, or are you in partnership?

A. Partnership.

Q. In which you are the senior member; I don't want to go into details, but you have a partner?

A. Yes, sir; but I think I have a partner who is a year or two older than I am.

Q. Well, that isn't what I meant. Have you heard read by me the testimony of Mr. Joseph W. MeElroy and Mr. James Ludlum, as reported in the stenographer's notes of this case, in reference to the nature and character of his services as superintendent of the Steel Works of J. Horner and Company from 1869 to 1874? A. I have heard it read.

JUDGE STEVENS objects to the form of the question, and claims that the testimony ought to be read to the witness in open Court; or else the fact should be stated openly to the witness.

Q. Have I read the examination to you, both the direct and cross examination, in reference to the services of Mr. McElroy?

A. Yes, sir; and you will recollect that I heard this testimony upon a former occasion.

Q. You heard Mr. McElroy give his testimony?

A. Yes, sir.

By JUDGE STEVENS: At Paterson?

By MR. EMERY: Yes.

Q. You heard Mr. McElroy testify there, and I have also read the testimony given here to you; now, taking Mr. McElroy's statement, taking the statement of the nature and character of Mr. McElroy's services as testified to upon this examination taken in this case, as detailed in the examination of Mr. McElroy and Mr. Ludlum, to be true, what in your judgment would be a fair annual salary for Mr. McElroy's services as Superintendent of the Steel Works of J. Horner and Company during the years 1869 to 1874, considering the amount and character of the work done at the factory, and the nature and character of Mr. McElroy's services as set out in those examinations?

A. Allow me to state in explanation that Mr. McElroy seems to have occupied a peculiar position, as I understand it; Mr. McElroy seems to have had entire control of the manufacture of the steel in that establishment, and to have commenced at a

little earlier period in the manufacture than most Superintendents are called upon to do. He commenced by puddling the material by using a certain patent process, which, as I understand it, was advantageous to that concern, and only was in Mr. McElroy's hands, he thoroughly understanding it and perhaps being an expert in that particular patent; and as I understand it, Mr. Ludlum also, in his statement, says, that he paid no attention to the manufacture of the steel. He simply provided the raw material and Mr. McElroy turned out the steel ready for sale. Now, with my experience, there are very few superintendents who can take that responsibility in a factory, and to answer your question directly, it may seem as if I was arriving at a conclusion very abruptly on this occasion, but my former information on this subject—my former testimony on this subject which I recall and remember was to the effect that in my judgment, any man's services—any man that would perform such services as that would be worth five thousand dollars a year.

Q. Now, I will ask you another question, Mr. Thompson. Suppose it to be the fact that Mr. McElroy was superintendent of the steel works for J. Horner and Company at Pompton from July first, 1869, to about the first of July, 1874; that during that interval he had under his supervision and control seventy to eighty-five men; and that the mill turned out four and a half to five and a half and sometimes even as high as seven tons a day of finished steel; that he had no assistant superintendent under him, but superintended the whole work of the manufacture of the steel himself; that during the whole of that time both partners of the firm were relieved from all active attendance, supervision or responsibility over the manufacture of the steel, and that the work of the manufacture of the steel was throughout satisfactory to the trade and firm; that no complaints

were ever made against Mr. McElroy during that time by the firm; that he devoted his whole time to the work; that during the whole interval he was not absent a single day until after the panic of 1873; that during part of the time, especially the latter part of the period, the manufactury was obliged to run considerably at night; and that he also exercised the superintendence, as far as was necessary, over that work; that the senior partner of the firm, during the time of his superintendence did not visit the works on an average of more than once a month; that the other member of the firm was relieved from the responsibility as to the manufacture of the steel, and was able to devote himself to other branches of the firm's business, and did not, in fact, assist Mr. McElroy in the supervision of the manufactory; that most of the steel manufactured during this time was made under a process of which Mr. Mc Elroy was one of the inventors, and which required special skill and knowledge for its successful use; and that Mr. McElroy was posted in this special skill and knowledge; and that in the hands of previous persons the manufacture under the process had not been successful.—Taking those facts to be established, what do you say would be the value of his services as superintendent of that manufactory in reference to the nature and character of the produce, the amount of work done, and the assistance given to the partners in the business?

A. The most of that information and the facts you have stated have been make known to me before on a former examination.

Q. And also by reading this testimony?

A. And by reading a good deal of that testimony.

Q. Well?

A. I don't know that I could change my judgment in reference to the value of the services.

Q. Under that supervision you considered them worth five thousand dollars a year?

A. That would be my judgment, sir.

Q. Would it, in your judgment, make any difference that in the rolling and melting of the steel the work was done by contract by the ton?

A. Make a difference in what do you mean?

Q. In Mr. McElroy's compensation?

A. Where work is done by contract we find it quite as important to have a general supervision over that work as where it is done by the day, and in many cases it requires a more strict examination, because there is every inducement for the contractor to foist on the employer indifferent work if he can, and therefore a general superintendency is quite as advantageous to it in overlooking the busines where it is done by contract as where it is done by the day.

Q. That's all.

Cross-examined by JUDGE STEVENS:

Q. Do you recollect the suit brought by Mr. McElroy against Mr. Ludlum in the Supreme Court, which was tried at Paterson before Judge Dixon?

A. I think I was a witness there, sir.

Q. On whose behalf?

A. I really don't remember for which side I received the subpoena.

Q. Were you not subpoenaed by Mr. McElroy?

A. It is very probable, sir, but I don't remember positively.

Q. Do you recollect whether Mr. Buckingham was present (pointing to Mr. Buckingham)—this gentleman who sits here, at that trial?

A. I don't remember whether he was there or not, sir.

Q. Do you remember who conducted the case on the part of Mr. Ludlum?

A. Do you mean the lawyer?

Q. Yes? A. I do not, sir.

Q. Was it not a young man by the name of Laurence?

A. I remember a young man who was the lawyer

and he was from Newark, if I remember correctly.

Q. From Jersey City, you mean?

A. Yes, sir, from Jersey City; I rode down in the cars with him.

Q. A young man, was not he? A. Yes, sir.

Q. Did anyone else appear on the part of Mr. Ludlum, except Mr. Laurence?

A. Not as I am aware of.

Q. You are at present engaged in the manufacture of steel? A. Yes, sir.

Q. At the Jersey City Steel works?

A. Yes, sir.

Q. How long have you been engaged in the manufacture of steel in those works?

A. Since 1861; we built those works in 1861.

Q. How much steel do you turn out?

A. At the present time?

Q, At the present time?

A. Twenty to thirty tons.

Q. Do you employ a superintendent to take active charge of that manufacture?

A. Yes, sir; we have a superintendent there.

Q. Are his duties similar to those that Mr. McElroy performed? A. They are similar, yes, sir.

Q. How many men have you engaged in that manufacture? A. I really can't say, sir.

Q. About how many?

A. I should say a hundred and fifty, but may be more.

Q. What salary does your superintendent receive?

(Objected to.)

By JUDGE STEVENS: I desire to compare the rate of wages paid now with what were paid in 1866 up to 1874.

By the COURT: Then why not go at it directly.

By JUDGE STEVENS: I withdraw that question for the present then.

By the COURT: If there is any view in which it

seems to me to be competent, or relevant hereafter I will admit it.

Q. Did you employ a superintendent in your works in 1868? A. No, sir.

Q. 1869? A. No, sir.

Q. 1870? A. No, sir.

Q. 1871? A. No, sir.

Q. When did you first employ a superintendent?

A. We were peculiarly circumstanced, my partners, two of them were practical men and they acted as our superintendents.

By Mr. Emery:

Q. During those years?

A. Yes, sir; and up to four years ago, when one them died, therefore until within two years ago we never had what we understood to be a general superintendent, from the fact that my partner occupied that position in the works.

Further-cross:

Q. Then, I understand it, your partners received no compensation for their services when engaged in that duty?

A. They were interested in the profit the same as I was.

Q. Did they have any sum of money guaranteed to them?

A. No, sir; they were full partners in every sense of the word; if there were losses, they stood it; if there were gains, they got their share.

Q. How does the rate of wages, or the salaries paid to superintendents of steel works, now compare with those paid superintendents in 1868?

(Objected to. Objection overruled.)

The Stenographer read the question.

By the Court: Q. As a general rule, Mr. Thompson, are they more or less now than they were during the time covered by the period of Mr. McElroy's services?

By Judge Stevens: Well, I would prefer to put

the question first in the other shape; my question relates simply to the single period of 1868; your Honor's question covers the whole period.

After some little discussion the COURT said: I will allow you to put the question in the shape you desire.

By JUDGE STEVENS: I will change it from 1868 to 1869, which was the time when Mr. McElroy commenced his services.

By the COURT to the STENOGRAPHER: Change the form of the question, then, Mr. Knight, and read it to the witness.

The STENOGRAPHER read as follows: How does the rate of wages or salaries paid superintendents of steel works now compare with those paid superintendents in 1869?

By the COURT: Q. The question now relates to the period of Mr. McElroy's services from 1869 to 1874?

A. I am asked about superintendents' wages during that period?

Q. Yes.

A. My answer must be that I don't know.

Further Cross:

Q. Then I understand you to say that you don't know what the value of superintendents' services were during those years?

A. I do not, from my own experience; we have had no such men in our employ.

Q. Then, upon what did you base your answer to the question of counsel, when you said that you considered the services of Mr. McElroy worth so much between 1869 and 1874?

A. What did I base my judgment on?

Q. Yes?

A. My knowledge of what Mr. McElroy did for the Pompton Steel Works.

Q. But you have stated that you don't know what the value of superintendents' wages were—super-

intendents of steel works in general—between 1869 and 1874; you say that, don't you?

A. You asked me whether, so far as I am concerned, I knew for our purpose what the value of superintendents' services were.

Q. No, I mean do you know generally; you are testifying now as an expert, and are supposed to know the value of the services of superintendents of steel works; now I am speaking of the value of superintendents' services?

A. In a general way?

Q. Yes?

By the Court: The witness seems to have understood the question to relate to his own works; I didn't understand the question that way; I understood it to relate generally.

By the Witness: I didn't so understand it, sir.

By the Court: Read the question Mr. Stenographer.

The Stenographer read as follows: "How does the rate of wages or salaries paid to superintendents of steel works now compare with those paid to superintendents from 1869 to 1874?"

A. I was under the impression that the question applied to our specific works and not in a general way.

Q. No, the question is general, referring to any works?

A. That would alter my answer very decidedly.

Q. Well?

A. You ask now the wages paid for ordinary services between 1869 and 1874?

By the Court:

Q. The question is limited to the salaries of superintendents; what Judge Stevens wants to know is whether skill and services of that kind commanded higher price between 1869 and 1874 than they do now, or less?

A. I should say the value of such services dur-

ing that period would be quite as much as at present.

Q. Well, about the same?

A. I should say so.

Further Cross:

Q. Now, would the value of the services differ in 1869 from what it was in September, 1873, after the panic?

A. Everything wes depressed after the panic of course.

Q. And the panic occurred in the fall of 1872?

By Mr. Emery: No, sir; it was later than that; it occurred in 1873.

By the Court: My recollection is it was in September, 1873.

Q. Well, then, September, 1873?

A. Most business men have reason to remember it.

Q. Then it is 1873? A. Yes, sir.

Q. I will take your word for it; now please answer my question? A. What was it?

Q. Please read it?

The Stenographer read as follows: "Now, would the value of the services differ in 1869 from what it was in 1873, after the panic?"

A. Upon general principles I should say that salaries would be reduced during the period after the panic—they were and wages were.

Q. How much?

A. I couldn't tell you how much.

Q. A half or a third?

A. Oh, no, sir; not as much as that; I know we paid less wages after the panic, and we had less to do than we had prior to the panic; there was less work to be done and there were a great many more men seeking employment.

Q. How much less do you think they would be after the panic than before? A. I couldn't tell you.

Q. Would not they be as much less as one-third less?

A. Do you mean in percentage, less 5 per cent. or 10 per cent.?

Q. Yes?

By Mr. EMERY: The witness says that the panic occurred in September, 1873; it is not fair to argue from that that on the 1st of October there would be a general reduction in wages; the time of this inquiry expired on the 1st of July, 1874, and I think the question should be put in such a shape as to direct the attention of the witness to whether previous to July, 1874, there was any reduction made.

By the COURT: The Court will take notice of the laws of business; I don't suppose that anybody believes that wages generally were reduced immediately after the panic occurred.

By Judge STEVENS: If the witness will answer this question, then I will ask him when he commenced to reduce wages.

By the COURT: The witness has said that the effect of the panic on wages was to reduce them; but, he cannot now, without reflection, estimate the exact percentage that they were reduced. That is all a witness can be required to state.

By the WITNESS: By reference to our wages book I can tell exactly the reduction we made in our wages, but from memory I cannot.

Q. You can't say whether it was a third or a fourth, or what?

A. It would be simply a guess, and I prefer not to do that.

Q. What salary do you pay your superintendent at present?

A. We have a man that we call our general superintendent to whom we pay five thousand dollars a year. He has two assistants, one for the daytime and one for the night-time. They are two young men, and they are paid by the week. I really can't, at this moment, recall what they are

paid, but I think it is not less than $15 a week, and perhaps $20. I can't say positively.

Q. Do those two young men take charge of any particular department of the business?

A. No, sir.

Q. What are the duties of this superintendent to whom you pay $5,000 a year?

A. His duties are something varied. His duties are to receive orders from the office in the morning. For instance, we have an order to fill for 10 tons or 20 tons of steel of a certain class; that order is put into his hands to fill. Then we have another order for ten tons of steel of another grade or class entirely, and that is put into his hands; and so you go on and he will perhaps have on his desk orders for 50 or 75 tons of steel, and every five tons of it will vary.

Q. I will be more specific in my question, so as to call your attention to the particular point. Does he buy any of the raw material? A. No, sir.

Q. Does he make any sales? A. No, sir.

Q. Is it necessary for him to make out what are called mill calculations?

A. I don't understand what you mean by the term "mill" calculations.

Q. Do you make great varieties of steel in your business? A. Yes, sir.

Q. Is it necessary to compute the amount of steel to be used, and the volume of it, and all that, in order that you have no waste?

A. I don't understand you, sir.

Q. Is it necessary, to a certain extent, to make mathematical calculations with a view to prevent waste in the manufacture of the various kinds of steel that you manufacture?

A. We never had any mathematics in our factory about it; common sense is all we expect to use.

Q. You don't make any nice calculations?

A. No, sir.

By the COURT: What do you mean by mill calculations, Mr. Stevens?

By Mr. STEVENS: It is a phrase well-known to any steel manufacturer. It is to ascertain how many pounds of material to put into a crucible to make particular kinds of steel.

By the WITNESS: There is no calculation necessary for that purpose; we put 80 pounds of iron into a crucible and melt it, and it comes out and is dumped into an ingot, and you know that weighs 80 pounds; and if we want an ingot double that, we put two pots into one ingot that will hold twice as much as the other, and we know that that weighs a hundred and sixty pounds, and it requires no calculation for that.

Q. I wanted to know whether it was necessary to indulge in nice calculations, and you say it is not; now, that's all I wan't to know on that point?

A. As far as I understand your question I don't consider that any nice calculations are necessary; there is a good deal more judgment necessary than mathematics.

Q. Do your works run by night as well as by day? A. Yes, sir.

Q. Very frequently?

A. At present we are running nights, and have been for several months.

Q. Does your superintendent occasionally come there nights?

A. Our superintendent is very seldom over there at nights.

Q. Doesn't he occasionally come there in the evening?

A. It is very rare if he does; it isn't his practice, and I don't suppose he is there once a month.

Q. But he does go there once a month?

A. I am not aware that he goes there at all in the evenings; he lives in New York, and our works are in Jersey City; we don't require him to be there, and I am not aware of his being there.

Q. Does he do more than superintend the practical manufacture of the steel? A. No, sir.

Q. Does he solicit orders?

A. No, sir; that is out of his line entirely.

Q. Then his duties are precisely the same as the duties of Mr. McElroy?

A. Yes, sir: I take it to be so; he is a man that understands not only the manufacture but the use of steel thoroughly and largely, and if we were furnishing a customer in Newark with steel, and we got into trouble with that customer, we might send our superintendent out to see him and clear up the difficulty; beyond services of that kind, he renders no services except as general superintendent.

Q. Is he a man of education?

A. That is an indefinite term; he can read and write I know.

Q. Is he a man that has had any special education?

A. I really could not answer the question positively, I should say he was a man of very fair education.

Q. How long has he been with you?

A. For less than two years.

Q. What had he been doing prior to that time?

(Ojected to.)

A. The same kind of work.

Q. He had been Superintendent? A. Yes, sir.

Q. Do you know for how many years?

Q. I should say ten to fifteen years in one concern in Pittsburg, he was brought up there.

Q. Mr. Thompson, is it customary to give Superintendents of steel works turning out say 3 or 4 tons of polished steel a day as much as Superintendents of factories which turn out 30 or 40 tons a day?

A. Upon general principles I presume not, sir.

Q. Would it be possible to do so if the business was to be a profitable one?

A. The Superintendent in one case as well as in

the other would have his entire time occupied; and I do not consider that it would be the fault of the Superintendent if he didn't turn out twenty tons a day; he might just as well superintend the turning out of twenty tons as ten.

Q. Does it not require a man as a general thing of larger caliber in a factory where forty tons are turned out than where four are, just in the same way as it requires a man of greater talent to manage an army of a hundred thousand men than it does an army of ten thousand?

A. Well, he has got to have a different organization to do that.

Q. And are not men of greater capacity usually selected in larger works?

A. Well, I am not so clear on that subject, sir; it isn't an uncommon thing to meet a man in business that is competent to turn out a small quantity of material and it is the same brain work with him; now, if you double that capacity he has simply got to double his organization.

Q. Does it not require larger powers of organization?

A. I don't see that that would be very material, sir.

Q. But as a practical thing, do superintendents of steel works turning out 40 tons of steel a day—do they not receive a larger compensation than superintendents of smaller steel works turning out four tons a day?

A. I don't think the compensation is in proportion to the product by any means.

Q. I did not ask you that?

A. But my impression is that superintendents of works turning out 40 tons a day, as you suggest, would naturally expect more wages than if they were turning out four tons a day.

Q. Now, do you know, as a matter of fact—of your own knowledge, what superintendents of steel works were receiving between the years 1869

and 1874; I am speaking of superintendents who are such simply, not of men who have a share in the business?

A. I have knowledge of the factory right opposite to us where a gentleman of my acquaintance occupied the position of superintendent for a number of years.

A. Have you any knowledge other than that?

A. I have not had any direct knowledge in regard to other factories, as I have in that instance. I have knownof wages of superintendents in Pittsburg in some of the factories there by hearsay. Of my own knowledge I can't say that I do know.

Q. I am now speaking of that particular period, 1869 to 1874?

A. Well, my answer would be the same.

Q. Now, wherein do you distinguish the services which Mr. McElroy rendered as superintendentfrom the services which any other superintendent of works equally large would be?

A. For instance, if you will allow me to explain, our superintendent has all the stock he is called upon to use brought and laid down in the yard ready to put in the crucible. Mr. McElroy commenced with the raw material and prepared the stock ready for the crucible, in which his services differed from our superintendent.

Q. I understand you to say that there was one more process necessary?

A. Just that, sir. He takes the raw material and prepares it for the crucible; whereas our superintendent has the raw material prepared for him, and he simply puts it into the crucible and goes on with it after that. In that regard Mr. McElroy's services would differ from our superintendent.

Q. But would they differ from the service which most superintendents of steel works render?

A. I don't know of a superintendent of a steel

works where the superintendent would commence at the point where Mr. McElroy did.

Q. Then you think that was a peculiar feature of the case? A. Yes, sir.

Q. Now, what other characteristic is there?

A. I don't at the present moment know of any other.

Q. Then do you base your ideas of the value of his services upon his superintending that particular thing to which you have just alluded in addition to the other duties of superintendent?

A. That would add to the value of his services as superintendent in my judgment.

Q, How much would it add?

A. If all I have heard about their stock is correct it added a good deal; I can't say positively what it added.

Q. There was no testimony in regard to that, was there? A. I believe there was.

Q. Well, please state what that testimony was upon which you base your judgment?

A. Mr. Ludlum has stated to me personally—(interrupted.)

Q. I don't want you to base your testimony on what Mr. Ludlum said; I want you to base your testimony on the reading of Mr. McElroy's testimony alone?

By Mr. Emery: McElroy's and Ludlum's too.

Q. Did you hear Mr. Ludlum's testimony too?

A. Yes, sir, and I know something about the process, if you wish to get at the facts of the case, used by Mr. McElroy in that process of manufacturing steel; I have read the patent and seen the work, and at one time we thought of doing something in that line; I know this aside from any testimony in the matter, and I can give you my opinion as to the value of the process.

Q. I don't want you to give your opinion as to the value of the process; I want you to state from the testimony of Mr. Ludlum and Mr. McElroy,

which was read to you, what additional value was imparted to Mr. McElroy's services by reason of this superintending the part of the process of the manufacture of steel which was omitted in your business ?

A. Have you established before your Court here in any way the fact that Mr. McElroy's process was important to the manufacture of steel of that company ; I believe that was admitted.

By Mr. Emery : That is admitted.

By the Witness: Mr. Ludlum in his statement says, that without Mr. McElroy's services they could not have used this process, I think he stated that they had tried and failed, and therefore if you ask me that direct question I can only answer it by an explanation ; Mr. McElroy by his process, as I understand it, takes pig metal of the value of twenty-five dollars, or twenty-seven dollars a ton, and by the peculiar mode in which he manipulates it in their furnace, he turns it out into a material which takes the place of what would be fifty-five to sixty dollars a ton ; or in other words, he prepares his stock for the crucible the same as our stock is prepared but he starts with a material costing twenty-seven to thirty dollars a ton, and when he gets through with that material it is worth, according to their statement, $60 a ton, or it is what would cost us $60 a ton for stock for the crucible ; now, that is of considerable value, if that is admitted here ; I am not prepared to say that is correct, but they claim it is.

Q. You base your statement as to the value of his services upon his knowledge of the Patent Process ? A. I say it adds to the value of his services.

Q. Is it the only thing that adds to the value of his services beyond what would be the value of the services of an ordinary superintendent ? A. It is the principal thing ; I should say so.

Q. Do you give him an increased compensation

by reason of his knowledge of that Patent Process?

A. Well, you can call it a Patent Process; I don't know anything about that.

Q. They call it that? A. I say that Mr. McElroy's services are increased in value from the fact that he commenced one step lower down and takes raw material for his purpose, where we have to take material that is more advanced, in the process of manufacture; he makes his material take the place of ours, which costs more money.

Q. But in doing so you have adverted to the fact of his being skilled in the manipulation of a certain process? A. Yes, sir.

Q. Now, I wish to know whether it is his knowledge of that process in that particular stage of the manufacture of steel which induces you to accord to him a larger compensation than he would otherwise receive? A. His knowledge of the process, together with his ability to utilize it certainly enters into it.

Q. Those are the two elements. Now, suppose that they were out of the case, commenced where you commenced, having only such skill as an ordinary superintendent possesses, what compensation would you give him per year? A. Well, I am really not prepared to answer that question, I have looked at this matter as a whole thing; now, if you put it separately I must have time to reflect upon it.

Q. Then I understand you to say that you don't know as an expert what the value of Mr. McElroy's services as a superintendent of Steel Works conducted like yours, only not turning out as much material, would be? A. As I said before, I have looked at this matter as a whole.

Q. You are speaking as an expert now in reference to the value of the services of superintendents, and you ought certainly, as an expert, to be able to answer this question? A. I don't know whether I am an expert or not, sir.

Q. I asked you what the value of Mr. McElroy's

services would be divorced from that patent process; do you know, or not? A. I don't feel at liberty to answer that question.

Q. Do you know, or not, at present? A. I do not.

Q. Then your estimate of the value of Mr. McElroy's services are based upon your finding as one of the essential elements of his services that he possesses this peculiar knowledge in reference to this particular process and that he utilizes it?

A. As I said before, that would add to the value of his services, in my judgment.

Q. Now, Mr. Thompson, suppose as Mr. McElroy has testified that the patent process were sold to the firm of J. Horner & Company, and was their property and not in any degree whatever McElroy's, and suppose further, as he has testified, that he had in the course of two or three years made others equally familiar with that process as he himself was—(interrupted).

By Mr. Emery: Judge Stevens, he didn't say so.

Q. He said he could teach that process in the course of two or three years, so that others would perfectly understand it—let me put my question my own way and if I have misconstrued his testimony you can correct me. What then would you think the value of his services were worth?

A. The value of his services to Mr. Ludlum?

Q. No; I am not speaking of that; I am speaking of the value of his services as a superintendent of steel works outside of that patent process. Suppose it was no longer necessary to retain him as superintendent?

(Objected to.)

By The Court: That comes back, Judge, to the question you have just asked the witness, and which he says he cannot answer without an opportunity for consideration and reflection; that in making up his estimate he has looked at the whole services rendered by Mr. McElroy to J. Horner & Com-

pany in their steel works and has not considered it in separate parts but as a whole; now, you take him on the same question, which he very frankly has stated he could not answer without reflection.

Q. Do you know what this patent process is?

A. I know of it. I have read the patent, and I am somewhat familiar with the process by which the material is manipulated.

Q. Are you familiar with that process?

A. Somewhat.

Q. How long did it take you to acquire that familiarity?

A. I don't profess to have any familiarity except in the theory of the thing. I never saw it in operation mechanically.

Q. You don't know how long a practical experience would be required for a perfect practical knowledge of it?

A. I don't believe in perfect practical knowledge on any subject in which iron is concerned.

Q. You don't think that such a thing exists?

A. No, sir, I do not.

Q. I will drop the word *perfect* and use the word ordinary, or useful knowledge, such as would enable any man of intelligence to conduct the business according to that process?

A. I would not feel at liberty to answer in reference to that particular process; I know we have got men in our employment who have been puddlers for over thirty years, and are learning things every day. That process may be a singular one. I understand the theory of the process.

Q. Was the theory very difficult to grasp?

A. Do you mean the theory to you or to me when we read it?

Q. The theory to you as a practical man?

A. It would seem quite simple, but theory and practice are very different.

Q. Did you ever try it practically?

A. That process?

Q. Yes. A. No, sir.

Q. Have you a patent process in your own business? A. No, sir.

Q. You don't use any patent at all?

A. No, we don't need them.

Q. Now, you say that you are familiar with the business of J. Horner & Company; was that familiarity acquired by an actual examination of their works, or simply by what you have heard testified to here and at the trial before Judge Dixon, at Patterson, and from what Mr. Ludlum himself has told you?

A. You speak of the works at Pompton, or of my knowledge of the firm of J. Horner & Company?

Q. I speak of your familiarity with the business as carried on by J. Horner & Company, during those years from 1869 to 1874?

A. I have been at the Pompton works, sir.

Q. How often? A, Two or three times.

Q. When?

A. I couldn't name the years I was there, before Horner & Company went there, and I was there afterwards.

Q. Were you there between 1869 and 1874?

A. I couldn't say, sir.

Q. Then, you don't know of your own knowledge how much business was done between those years?

A. Not from my own knowledge.

Q. Did you talk with Mr. Ludlum on this subject?

A. I have talked with him in a general way for years; I am on intimate terms with him as I am with a great many other steel manufacturers.

Q. Have you had conversations with him in reference to what Mr. McElroy should receive for his services during those years 1869 to 1874?

A. I have had conversations with him in reference to Mr. McElroy's position here and the importance of it.

Q. And also in reference to the compensation to which he was entitled?

A. No, sir; he never suggested to me any compensation that he thought Mr. McElroy should have.

Q. Will you please state when you had that conversation about McElroy with him?

A. Oh! I have had a dozen, I presume, at different times, it was no uncommon thing when I met Mr. Ludlum years ago, before the litigation commenced, to speak about his process and Mr. McElroy's connection with it.

Q. I am speaking about conversations you have had in reference to the object of this proceeding—in reference to Mr. McElroy's recovery of additional compensation from the firm of J. Horner & Company.

A. I have not spoken to Mr. Ludlum on the subject; I don't think I ever spoke to him on the subject, or he to me, except on the day of the trial at Paterson, then there was some conversation passed between us.

Q. That's all.

Re-direct:

Q. Let me call your attention to one feature of the nature of the service of Mr. McElroy as detailed in his testimony, and that of Mr. Ludlum, which was this: that the services of Mr. McElroy in this manufactory were of such a character that neither of the partners themselves were required to exercise any supervision over his work in the manufacture, and that they were relieved from all care and responsibility as to that branch of their business. Is that the case with your superintendent?

A. I am sorry to say it is not, sir.

Q. Then what attention on the part of the partners, or either of them, does your superintendent require?

A. Well, we always expect to give more or less

attention to it, notwithstanding our superintendent.

Q. And do your partners give the manufacture of steel more or less of their personal attention?

A. One of our partners is in the mill all the time.

Q. Notwithstanding the fact that you have a superintendent there? A. Yes, sir.

Q. Is he the partner who is interested in the profits? A. He is still.

Q. And was formerly the superintendent of the actual manufacture? A. Yes, sir.

Q. From 1869 to 1874, I understand you to say that either one or two of your present partners performed the services of superintendent which Mr. McElroy did for James Horner & Company?

A. We had two partners during that time, and they were both practical men, and they were entirely in the mill.

Q. What share of the profits did they get during that time?

(Objected to.)

Q. Did they then do any work other than that of superintendent as your superintendent now does?

(Objected to.)

Q. Now, during those years what was the condition of the steel trade from 1869 up to the time of the panic, was it prosperous or otherwise?

A. Very prosperous.

Q. That's all.

Re-Cross:

Q. It has been assumed by the question which counsel put to you, that Mr. Ludlum did not superintend personally the works. Now, suppose it was in proof that Mr. Ludlum's office was within a few steps of the factory, and that he constantly did go over and see how things were going on, would that alter the value of Mr. McElroy's services, in your estimation?

A. If I recollect rightly, Mr. Ludlum states that he had nothing to do with it.

Q. That is not what I am asking you ; I want you to answer my question ?

A. If I were the superintendent, I would rather he should keep away.

Q. I didn't hear what you said ?

A. I say if I were the superintendent of those works I should prefer that he would keep away from them.

Q. That Mr. Ludlum would ?

A. Yes, or any other member of the firm, if I was held responsible.

Q. I suppose every superintendent prefers that ? Now, Mr. Knight, just ask that question again ?

THE STENOGRAPHER read the question as follows:

Q. "It has been assumed by the question which counsel put to you, that Mr. Ludlum did not superintend personally the works. Now, suppose that it were in proof that Mr. Ludlum's office was within a few steps of the factory, and that he constantly did go over and see how things were going on, would that alter the value of Mr. McElroy's services, in your estimation ?"

A. It would not, sir.

Q. That's all.

Re-Direct :

Q. Would not the fact that Mr. McElroy, by the character and nature of his work, was able to relieve his partners, make a difference in your estimate of the compensation to which he should be entitled to ?

BY THE COURT : He has already stated that.

BY THE WITNESS : Yes, I stated that.

PETITIONER RESTS.

ROBERT E. JENNINGS, a witness produced on the part of the defendant, having been duly sworn according to law, deposeth and saith :

Re-Direct Examination, by JUDGE STEVENS :

Q. Where do you reside ?

A. I live in Jersey City ; that is, that portion of Jersey City which is known as West Bergen.

Q. And what is your business ?

A. I am engaged in the business of manufacturing steel.

Q. Where ?

A. At the same place, West Bergen, a portion of Jersey City.

Q. What is the name of your works ?

A. We call it the West Bergen Steel works.

Q. How long have you been engaged in the manufacture of steel ?

A. Well, nearly two years ; it is two years the first of June since we started it.

Q. And before that time, what ?

A. Before that time I was employed by Benjamin Atha & Co. of Newark, in the capacity of a salesman.

Q. In Newark ? A. Yes, sir.

Q. How long have you been conversant with the steel business ?

A. Well, I commenced to learn something about the steel business in about 1871, and I have been learning ever since.

Q. Were you ever employed in the factory at Pompton ?

A. No, sir ; but I was employed by James Horner & Co., in the capacity of a salesman.

Q. When ?

A. Well, some time in October ; I think it was October, 1871, until about the first of May, 1872, they advertised in one of the New York papers for a salesman, and I replied to the advertisement, and received the position.

Q. That was 1871 or 1861.

A. That was 1871, from the fall of 1871, to the spring of 1872.

Q. Then you were in the employ of that company while Mr. McElroy was employed as superintendent? A. Yes, sir ; I was.

Q. Now, suppose a superintendent of steel works was employed in a factory which had a capacity of turning out from four to seven tons of finished steel a day, and that he employed from 60 to 75 or 80 workmen, that the character of the steel manufactured was such as had been stated to you by Mr. McElroy this morning in your presence, how much would you estimate as the value of his services, during the years 1871, 2, 3, and 4, down to July 1874?

(Objected to by petitioner's counsel, on the ground that sufficient foundation had not been laid for such a question to the witness.)

(Objection over-ruled.)

Q. I will add to that question this further thing ; that the superintendent which I have supposed, neither bought the raw material, nor sold any of the finished steel, but confined himself entirely to the practical part of the business?

A. Well, my opinion would be, that he was fairly well paid, and reasonably well paid, if he received a salary of two thousand dollars to twenty-five hundred dollars a year.

Q. Is that the compensation to which you would think him entitled at the present rate at which superintendents are paid—superintendents of that character?

A. I don't know much about what salaries superintendents are receiving ; I know what ours is getting, and I know from what Mr. Thompson has said this morning what his is getting ; that's all I know.

Q. From your knowledge, such as you have ac-

quired as an expert, please give me the best answer you can to my question?

A. Let me understand what your question is, Judge Stevens.

Q. Please read it?

THE STENOGRAPHER read the question as follows;

"Q. Is that the compensation to which you would think him entitled, at the present rate at which superintendents are paid—superintendents of that character?"

A. Yes, sir.

Cross-examined by Mr. EMERY:

Q. Your first connection with steel commenced in July, 1871, as salesman for J. Horner & Co.?

A. Yes, sir.

Q. Did you go out on the road? A. Yes, sir.

Q. To sell goods and send them in orders?

A. Yes, sir; I regret to say I did not send in many orders.

Q. I mean that was the nature of your business; how long did you stay with them?

A. I was there from October to a little before May.

Q. Where did you go then?

A. I went with the hardware house, in New York, of T. C. Richards & Company.

Q. As what? A. Salesman.

Q. How long did you remain with them?

A. Until I went with Benjamin Atha & Company, which was the first of the following July.

Q. In what capacity?

A. Salesman; and then I traveled with the hardware house and Benjamin Atha & Company until the first of January, when my connection with the hardware house ceased, and I became Benjamin Atha & Company's salesman; I went with Benjamin Atha & Company, in part, in July, 1872.

Q. So that in July, 1873, you were there as a salesman?

A. Up to January 1st, 1873, I was a salesman for this hardware house and for Benjamin Atha & Company, both at the same time, and after the 1st of January, 1873, I went with Benjamin Atha & Company entirely.

Q. And from time to time continued as a salesman?

A. Yes, sir; until February, 1879—No, it was February, 1880, when I left him.

Q. And you then formed a partnership with Mr. Spaulding? A. Yes, sir.

Q. During that time you were Mr. Atha's outside man? A. Yes, sir, I travelled and took orders.

Q. That's all.

By JUDGE STEVENS: I would like counsel to admit one or two facts within his knowledge. They are these: That at the trial of the case of Ludlum *v.* McElroy before Judge Dixon, three witnesses, whose names counsel can give me I suppose, one of them Mr. McElroy, another Mr. Thompson, and the third, whose name I don't recollect, were examined on the part of the plaintiff and Mr. Ludlum himself only on behalf of the defendant. That Mr. Ludlum was represented there only by his attorney, Mr. Laurence. I want that fact to appear more clearly than it does. I desire to show that Mr. Ludlum only made a sham defense to the action. The inference is my own. I desire to have the fact on record. Mr. Wright was the other witness, therefore I want it to appear in the case that Mr. Wright, McElroy and Thompson were witnesses sworn on behalf of the plaintiff in that case; and that Mr. Ludlum was the only witness sworn on behalf of the defendant, and that Mr. Laurence only appeared as Mr. Ludlum's counsel.

By Mr. EMERY: I have no objection to admitting that, but I must ask you whether you are willing to admit the evidence of those witnesses and the charge of the Judge on the trial.

By JUDGE STEVENS: I am not willing to do that.

Mr. EMORY offers in evidence the judgment re-

covered in the case referred to, and also a letter from Mr. Ludlum to Mr. Ricord, notifying him that some persons desire him to act for them at the sale; also notifying him that Mr. McElroy has an unsettled account against the estate, and asks the right to bid for the property, and after paying a portion of the purchase money that the account should be settled by the Court.

By JUDGE STEVENS: If this is offered, I should like to offer in evidence the order directing the personal property to be sold. If the order goes in I shall have no objection to this as proving that Mr. Ludlum says that Mr. McElroy had a claim; of course I don't admit anything more.

After some further discussion, JUDGE STEVENS said: "I now say that I only offer the order to overcome the effect of the letter, in case the letter shall be admitted in evidence, but I *object* to the letter being admitted.

(Offer overruled).

Case closed.

PETITIONER'S EXHIBITS.

PETITIONER McELROY'S EXHIBITS.

Exhibit No. 1.

Steel Works a/c—July 1, '69, to July 1, '74.

			RECEIPTS.	DISBURSEMENTS.	DEB BAL.	CREDT BAL
1st	year	July '69 to July '70	180,263.22	158,333.73	.. ..	21,929.49
2d	year	July '70 to July '71	217,748.58	149,719.45	.. ..	68,029.13
3d	year	July '71 to July '72	286,163.80	215,832.95	.. ..	70,330.85
4th	year	July '72 to July '73	355,523.79	299,677.39	.. ..	55,846.40
5th	year	July '73 to July '74	180,948.11	142,022.65	.. ..	38,925.46
			1220,647.50	965,586.17	.. ..	255,061.33

Exhibit No. 2.

INVENTORY OF JULY 1, 1869.

(Original to be referred to if necessary.)

Exhibit No. 3.

Judgment obtained by Joseph W. McElroy

v.

James Ludlum.

New Jersey Supreme Court.

Joseph W. McElroy
v.
James Ludlum. } In case.

Summons issued Sept. 10, 1880.

Judgment final for $21,300.06 damages, and $61.84 costs.

(Judgment record as stated. Original to be referred to if necessary.)

DEFENDANT'S RECEIVER'S EXHIBITS.

No. 1.

Extract from Journal H, page 48.

	June 17		
68	Steel Works to J. W. McElroy. For 5 years salary to July 1st, 1874. Guaranteeed to be not less than $3,000 per annum.	15,000.00	15,000.00
161	*A further allowance to make his compensation equal to $\frac{1}{8}$th of the net profits of the business to be made to him.		

*Written over an erasure in the original.

No. 2.

Copy of Page 161 of Ledger No. 5 of J. Horner & Co.

J. W. McELROY.

		Amt. forw'd		5,997.59
Sept	27	To expense ac	9..	70
	29	Cash	151..	20.00
		SteelWorks,H&B	11..	2.00
Oct.	8	Stove ac	10..	23.31
	6	Cash	155..	10.00
	8	"	..	400.00
	21	S W'ks, H & B..	18..	2.35
	14	Cash	159..	10.00
	23	S W'ks, H & B..	19..	2.00
	31	Farm, H & B	21..	10.00
	31	Church, H & B..	24..	4.00
	28	Cash	163..	15.00
Nov.	5	To Store	14..	40.04
	15	Cash	173..	200.00
	17	"	173..	50.00
	30	Farm, H & B	30..	10.00
	30	Church, H & B..	33..	4.00
	30	Steel Works	27..	12
Dec	5	Store	20..	16.42
	9	Farm	21..	60
	1	Cash	179..	2.40
	9	"	181..	7.73
	31	Farm, H & B	37..	10.00
	31	Church, H & B..	40..	4.00
	30	Cash	191..	2.20
	31	"	193..	5.20
1874.				
Jan	5	Store ac	24..	25.96
	9	Cash	195..	20.00
	12	"	199..	75.00
	20	"	203..	2.50
	31	Farm, H & B.	44..	10.00
	31	Church, H & B..	47..	5.00
Feb	6	Store	29..	25.89
	13	Cash	43..	225.00
	13	"	43..	75.00
	28	Farm, H & B	53..	10.00
	28	Church	55..	5.00
Mch	5	Store	33..	33.75
	11	Dr. McWitchey..	34..	16.00
	6	Cash	219..	5.00
	12	"	223..	100.00
	31	Farm, H & B	59..	10.00
		Amt. Brot up		7,493.66

1873.				
Oct	7	By Steel Works	10..	9.00
1874.				
July	17	" "	48..	15,000.00
	19	Old S Works	49..	5,727.25
	23	Sut ac	50..	188.85
	23	Cash	264..	7,031.03
				27,056.13
1874.				
		To Cash brot up	..	7,493.66
Mch	31	Church, B & H.	62..	5.00
Apl	7	Store	36..	25.43
	2	Cash	231..	100.00
	13	Farm, H & B	68..	2.00
	11	" "	68..	3.49
	30	" "	69..	10.00
		Church, "	72..	5.00
	22	Cash, "	241..	100.00
	24	" "	241..	50
		S W'ks, H & B..	66..	48
		Farm, H & B	68..	52
May	6	Store ac	42..	27.33
	7	Cash	247..	2.00
	7	Steel W'ks,H&B	75..	3.50
	21	Cash	251..	100.00
	21	"	253..	1.15
	31	Farm, H & B	79..	10.00
	31	Church, H & B.	82..	5.00
	31	SteelW'ks,H&B.	75..	2.88
		Farm, H & B	78..	37
June	3	Store	46..	38.60
	5	Cash	259..	10.00
	9	"	261..	20.00
	12	"	263..	20.00
	17	"	265..	7,031.03
	23	Bills rec'ble	50.	10,337.35
	23	Cash	265..	2,600.78
				27,956.13

EXHIBIT NO. 3.

Pompton, July 15th, 1874.

MRS. ALICE BUCKINGHAM, Executrix.

MADAM:

For your information I have to advise you that the assets of the firm of James Horner & Co., consists of . Real estate at Elizabethport and Pompton, including factories and fixed machinery.

Personal property in and around the Steel Works comprising tools and stock finished and in process.

Personal property belonging to the farm comprising farming implements, stock crops and lumber, carpenter shop, tools, &c., office fixtures, stationary &c, &c.

Books accounts due, bills receivable liable to slight changes in settlements, but which at this date aggregate about sixty-five thousand dollars and cash about four thousand.

The Liabilities now due and payable, consist of Mortgages $125,000 and sundry small debts, estimated $15,000 to $18,000.

In addition to the liabilities above named J. Horner & Co., are endorsers on business paper paid out in course of the business to the amount of about thirty thousand dollars, which will probably all be paid.

The inventories of personal property will be furnished as fast as possible and will be as near correct as they can be made.

I now enclose herewith a schedule of the personal property in and around the steel works.

I have not placed any value to it for two reasons, first want of time and second the impossibility of approximating to any thing like ultimate results.

In view of the companies liabilities for taxes, expenses and interest amounting to nearly one thous-

and dollars per month it is necessary that immediate steps be taken to dispose of the partnership property and stop this drain upon the resources.

I invite any suggestions you have to offer and shall be best pleased If I can get your prompt written assent to some definite policy.

Yours Respectfully,

JAMES LUDLUM.

EXHIBIT No. 4.

"POMPTON, July 23, 1880.

"ANDREW KIRKPATRICK,

"Receiver:

"Mr. McElroy has advised me that after "careful consideration and counsel, he has concluded to further prosecute his claim. With my "knowledge of the justice of his claim and that it "never could have been placed in jeopardy but for "his unfailing trust in my assurances that he was "safe in the protection of the Court, I cannot willingly assent to your proposition of July 13th. "It is too bad that a man's integrity and perfect "faith should cause his ruin in that way. Mr. "Dodd has given me his word that he would not "allow any encroachment upon Mr. McElroy's collateral deposit until he has exhausted his remedy. "I could make no appointment to meet Mr. McCarter until next Monday, therefore, I did not again "call on him. He may advise me that I am wrong, "and as I feel but too strongly the injustice which "has been done (through my carelessness, if you "please) to trust my own judgment, I may change "my mind when I can talk with Mr. McCarter.

Yours truly,

"JAMES LUDLUM."

EXHIBIT NO. 5.

NEW JERSEY SUPREME COURT.

JAMES LUDLUM, surviving partner, &c., *against* JOSEPH W. McELROY.	In Case &c.

On filing the affidavits of James Ludlum and Robert S. Lawrence, showing surprise and merits, on application of Frederic W. Stevens, esquire, of counsel with the defendant, it is, on this twenty-second day of December, Anno Domini eighteen hundred and eighty, ordered that the judgment interlocutory entered by the plaintiff in this suit be opened, and that the defendant James Ludlum have ten days' time to plead—the said defendant paying the costs of the plaintiff incurred in the entry of such judgment and in issuing of the writ of inquiry, and accepting short notice of trial—and serving copy of his plea.

JONATHAN DIXON,
Justice Supreme Court.

ROBERT L. LAURENCE,
Att'y, of Def't.

EXHIBIT No. 6.

"POMPTON, December 30th, 1880.

"ROBERT L. LAURENCE Esq.

"Dear Sir:

"Of the two pleas submitted for my signature I "return the one pleading payment and statute of "limitations for the reasons: First, as regards pay- "ment, I will not plead anything that I cannot "swear to; second, as to the statute, I am very posi- "tive that the record of the evidence in the McEl- "roy case before master Romaine will be used to "stultify me, as also several proceedings in the "Buckingham and Ludlum cases.

"As regards the employment of Mr. Stevens to "assist you will say, that I have desired him, as "Buckingham's counsel, to have full knowledge "of the case and all I did as it progressed, and am "perfectly willing to have him act with you in the "interests of his client, but not on my account nor "at my expense.

"Let that be distinctly understood, if anything "is said, for I prefer to deal frankly with him.

Yours truly,

JAMES LUDLUM, Survivor.

EXHIBIT No. 7.

"JANUARY 3d, 1881.

"Dear Sir:

"On Friday last I filed in the McElroy *v.* Lud- "lum case a plea of the general issue, and have "served upon Mr. Emory a copy with notice of the "filing.

"In regard to the pleas of payment and the stat- "ute of limitations, which I also prepared and sub- "mitted to Mr. Ludlum with explanations as to "their effect, the enclosed copy of the letter re- "ceived from him, which I send you with his con- "sent, will apprise you of his reasons for not having "them put in this case.

Yours truly,

"R. L. LAURENCE."

EXHIBIT No. 8.

I also read this letter:

"Dear Sir: The case of McElroy *v.* Ludlum has "been noticed for trial at the next term of the Pas- "saic Circuit. Mr. Ludlum wished me to notify "you of this and to say that he is perfectly willing "that Mr. Buckingham should take part in the "trial of the case if he chose to do so.

Yours truly,

"F. W. STEVENS. R. L. LAURENCE."

EXHIBIT No. 9.

APRIL 18th, 1881.

"ROBERT L. LAURENCE, Esq.

"DEAR SIR:

"Your note in reference to the McElroy suit is "at hand.

"In view of the fact that Mr. Ludlum has delib- "erately refused to plead in the manner I advised, "it seems to me somewhat extraordinary that I "should be asked to conduct his defence or take "part in so doing. Any judgment which he may "allow McElroy to obtain against him will, as I "understand the matter, be purely personal, in no "wise effecting Mrs. Buckingham's interest, or "that of James Horner's estate.

"Yours truly,

"F. W. STEVENS."

EXHIBIT No. 10.

POMPTON. April 22d, 1881.

"F. W. STEVENS, Esq.:

"DEAR SIR;

"Mr. Laurence has shown me your letter "wherein you expressed surprise at my asking "your assistance in the McElroy case, when I had "declined to plead as you suggested. I think you "mistake my meaning and motives, my only ob- "ject in accepting your assistance, 'if you chose to

"render it at your client's expense,' was to give "you and them all possible opportunity to see and "know my action and evidence.

"I hope you did not get the idea from my first "overture to you (made with the above object) "that I intend to combine with your clients to "rob a man under the shadow of the Statute of "Limitations, who had trusted J. Horner & Co., "that may be legal, but in my humble judgment "would be dishonest, false and indecent.

"I mean to defend that suit just as far as is right "and no farther, and to give you a chance to see "that I do it.

"Yours truly,
"JAMES LUDLUM."

EXHIBIT No. 11.

POMPTON, Nov. 21st, 1876.

Hon. J. RICORD:

DEAR SIR:

I beg leave to notify you that the following persons, some of whom may be present at the sale to-day, have desired me to act for them and I shall only act as agent. It is not my intention to bid for myself individually at all. The parties above mentioned are Richard Wright, Joseph W. McElroy, Erastus Corning, Mr. White, F. F. Breese, Charles Parker, James R. Thompson and C. Ludlum.

With reference to the first two persons, viz.: Richard Wright and Joseph W. McElroy, it is understood that they have unsettled accounts with the estate of J. H. & C. That (10) ten per cent. shall be deposited by them as security for any purchase they may make. That they shall take the goods, but not until their accounts have been adjusted to the satisfaction of the Court, nor until they have paid whatever sum may be found due over and above their credits. With reference to Erastus

Corning, that he also may purchase by depositing a security of (10) ten per cent., and that on the delivery of the goods the whole sum not exceeding thirty thousand dollars (to which sum he has limited his purchase) shall be applied on his mortgage claim, with reference to all the other parties named and also to myself, in case I should decide to buy anything, it is understood that a ten per cent. cash payment is required and agreed to be paid down as security at the time of sale, and that all other conditions of sale are to be carried out.

On this basis a deposit is herewith made of two thousand dollars, with the understanding that more shall be added to it as the sale progresses, if necessary to comply with the terms heretofore stated or that any excess shall be refunded at the close of the sale.

JAMES LUDLUM.

EXHIBIT NO. 12 FOR COMPLAINANT.

IN CHANCERY OF NEW JERSEY.

BETWEEN JOSEPH W. McELROY, Complainant, *and* JAMES LUDLUM *et al.*, Defendants.	Bill to Account.

To the Honorable THEODORE RUNYON, Chancellor of the State of New Jersey:

In equity complaining shows unto your Honor,

your orator, Joseph W. McElroy, of the township of Pompton, in the county of Passaic, and State of New Jersey:

1. That he has been for many years prior to the death of James Horner, which took place in June, 1874, in the employ of James Horner & Co., who had been carrying on an extensive steel works in Pompton aforesaid. That his wages and salary had been from time to time, during the said employment and anterior to July, 1869, advanced and increased. That your orator believes that the successful management of the steel works of the same James Horner & Co. was largely due to the attention and efforts of your orator. That he endeavored, by economy and strict attention to the business of said firm, to render himself a valuable, if not an indispensable employe of the firm of said James Horner & Co. That he believes it was owing to his strict attention to their business that the said firm made him superintendent of their steel works at Pompton aforesaid.

2. And your orator further shows, that during the time of his said employment by said firm his wages, or salary, were always regularly settled or paid, until about the first day of July, A, D., 1869, when a new arrangement was made between said firm and your orator, respecting the compensation to be paid by said firm to your orator, for his superintendence of the Pompton Steel Works, to wit:

That said firm of James Horner & Co., then consisting of James Horner, now deceased, and James Ludlum, his surviving partner, on or about the first day of July, A. D., 1869, at Pompton aforesaid, agreed with your orator to pay him, as compensation for his superintendence of the said steel works one-eighth ($\frac{1}{8}$) of the profits of the business of the said steel works, during the time he should

be the superintendent thereof, after said day, and they did also, then and there, guarantee to your orator that the one-eighth of said profits should not be less than three thousand dollars in each year thereafter.

3. And your orator further shows, that by this arrangement and agreement between said firm and your orator, he was sure of receiving from said firm, during the period of his superintendence, three thousand dollars in each year, and such proportion of the one-eighth of said profits as should appear to be annually made out of the said business.

4. And your orator further shows, that an inventory was taken of the personal property of said firm, connected with their said steel works, on the first day of July, A. D., 1869, but none after that date until the first day of July, 1874, and that in the meanwhile no settlement was made of his account with said firm respecting his said compensation.

That your orator believes that the same was an open or running account, and after the first day of July, 1874, that he was credited the sum so as aforesaid guaranteed to him and paid, but he charges that the profits of the said business were left unadjusted and unsettled, and the proportionate share thereof, due to him under said agreement, in excess of the sum already paid to him has never been paid to your orator.

That your orator is unable to state the amount of such excess, without an inspection and examination of the books of account of said late firm, both of which have been denied him.

5. And your orator further shows, that the said James Ludlum is the survivor of his late partner,

James Horner; that he was, on the 17th day of November, 1874, appointed the receiver of the real and personal property of the said firm of James Horner & Co., by an order signed by your Honor, in a cause wherein Alice Buckingham is complainant, and said James Ludlum is defendant, and as such receiver is entitled to have all the assets of the same in his hands for the purpose of paying the claims of creditors against said firm.

6. And your orator further shows, that the said James Horner left a last will and testament, wherein he made the said Alice Buckingham his executrix and sole devisee and legatee of his share of the property of said firm, except a small portion devised to Mrs. Susan H. Ludlum, the wife of the said James Ludlum. That Eliza Horner and Susan Horner were beneficiaries under the said will in the share of the property of said firm belonging to the said James Horner. That Eliza Horner has lately died.

7. And your orator further shows, that his said claim for said proportionate share of said profits of the business of said steel works, against the estate of said firm, is just and valid, and ought to be speedily ascertained and paid to him, and he believes the same cannot be less than forty thousand dollars.

8. And your orator further shows, that on the 21st day of November, 1876, he was a purchaser at the sale of the personal property of said firm, by the said receiver, to the amount of nine thousand dollars. That he has deposited with the Master in Chancery, who conducted the said sale, ten per cent. of the amount of his said purchase as a security therfor, and that, under the terms and conditions of said sale, he has no right to take the

goods so purchased by him until his accounts with the said firm shall have been adjusted to the satisfaction of this honorable Court.

9. And your orator further shows, that he has frequently, and in a friendly manner, applied to the said James Ludlum for a statement of his said accounts and settlement thereof, and asked him to permit your orator to inspect and examine the books of accounts of said firm, and vouchers and receipts given by him, and to take copies thereof, but the said James Ludlum has refused such permission, and has and does keep said books of account, and other papers therewith, closely in his possession.

All which actings and doings of the said James Ludlum, and his confederates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator.

In tender consideration whereof, and inasmuch as your orator is remediless in the premises in the courts of law, and can only have adequate relief in a court of equity, and to the end:

1. That the said James Ludlum and Susan H., his wife, Alice Buckingham and John M., her husband, and Susan Horner, and each of shem, may answer upon their respective oath or affirmative, according to the best of their respective knowledge, information and belief, all and singular the premises and each fact above stated.

2. That the said James Ludlum, surviving partner and receiver as aforesaid, may account to your orator for his said share of said profits, so due to him as aforesaid.

3. That said James Ludlum may be required to bring and produce before this honorable Court all

the books of account of the said late firm of James Horner & Co., relating to the said profits, and all papers, documents, receipts, vouchers, etc., in anywise relating thereto.

4. That the said James Ludlum may be required to account for the said profits, and state the same before such Master as may be appointed for that purpose.

5. That the said Receiver may, by the order of this Court, be directed to pay over to your orator the share of said profits found on said accounting to be due to him.

6. That your orator may have such other relief as the nature of his case requires, and as may be agreeable to equity.

May it please your Honor to grant unto your orator a writ of subpœna, issuing out and under the seal of the Court, to be directed to the said James Ludlum and Susan H., his wife, Alice Buckingham and John M., her husband, and Susan Horner, commanding them, on a certain day and under a certain penalty therein expressed, to be and appear before the honorable Court, then and there to answer the premises in manner aforesaid, and to stand to, abide by, and perform such order and decree as your Honor shall make therein.

A. S. JACKSON.
Solicitor and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

Between—

JOSEPH MCELROY,
Complainant,

and

JAMES LUDLUM, Receiver of JAMES HORNER & Co., ALICE BUCKINGHAM, Executrix of JAMES HORNER, deceased, and JOHN M. BUCKINGHAM, her husband, *et al.*,
Defendants.

On Bill, &c.

The several answer of James Ludlum, as Receiver of James Horner & Co., and individually, to the bill of complaint of Joseph McElroy, complainant.

1. This defendant, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors, uncertainties and untruths in the complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised are material for him to make answer unto, he answers and says :

2. That he admits it to be true that the complainant was empioyed for many years by the firm of James Horner & Co. (consisting of James Horner and this defendant), and up to the dissolution of said firm, which was caused on the ninth day of June, eighteen hundred and seventy-four, by the death of said James Horner, and that during all said time said complainant was a capable, faithful and valuable employee of said firm, and that his stipulated wages were always paid him, except as hereinafter stated.

3. And this defendant further admits that about the first day of July, eighteen hundred and sixty-nine, the said firm made an agreement with said complainant to continue him in their employment as superintendent of their steel works, on the terms and for the compensation stated in said bill, in the second and third paragraphs thereof.

4. And he also admits that an inventory was taken of the personal property of said firm on the first day of July, eighteen hundred and sixty-nine, and none after that until July first, eighteen hundred and seventy-four, and that in the meantime no settlement was made of the complainant's account with said firm ; and that said account remains open and unsettled, except that said complainant has received payment in full for so much of his said share of the profits of said business as is covered by the three thousand dollars a year, so guaranteed to him, the same having all been paid ; and he says that the balance due to said compiainant, on account of his said share of the profits of said business, can only be ascertained and determined by a careful investigation and examination of the books of said firm, and of the business carried on by them during the continuance of the said arrangement with complainant, but he denies that there is any such sum due to the complainant as forty thousand dollars, as stated in said bill.

5. And this defendant further says, that he was appointed receiver of the firm of James Horner & Co. by the Chancellor of New Jersey, in a cause depending in this Court, wherein Alice Buckingham, executrix of James Horner, and John M. Buckingham, her husband, are complainants and this defendant is receiver by an order made in said cause, bearing date on the thirteenth day of November, eighteen hundred and seventy-four, and since that time has had possession of or control

over the books of account of the said firm ; and he says that he has been unwilling to state and adjust any account with said Joseph McElroy, of the matters concerning which he has filed his said bill, because the said Alice Buckingham, as executrix of the said James Horner, deceased, and her said husband, are opposed to the allowance of anything to said complainant on account of his said claim, and deny that there is anything due him thereon, and this defendant has therefore considered it his duty as receiver and surviving partner of the late firm of James Horner & Co., not to undertake to adjust or settle said claim, but to require the complainant to establish his claim, if any he has, by judicial proceedings which will be binding and conclusive upon all parties concerned. And defendant says that the course thus adopted by him was with the approbation of the Court under whose orders he was and still is acting as receiver.

6. And this defendant further says, that he will at all times be ready and willing to produce all books and papers in his possession or under his control, having any bearing on the matters in controversy in this cause, and to give all proper aid and assistance in the examination of said accounts, and the ascertainment of the amount due complainant, if anything, with as little delay and expense as possible. That he has prepared a detailed statement of all transactions of the business referred to, which he believes will greatly shorten and facilitate said examination, and he joins in the prayer of said bill that an account may be taken of the amount due complainant, and that if anything be found due him, this defendant as receiver may be authorized to pay it.

7. All which matters and things this defendant is ready to aver, maintain and prove, as this Court may direct; and he humbly prays that he may be

hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

NEW JERSEY. }
COUNTY. } ss.

James Ludlum, the above defendant, being duly sworn, on his oath says, that the matters and things in the foregoing answer contained, so far as relate to his own acts are true, and so far as relate to the acts of others he believes them to be true.

Subscribed and sworn to before me, March 24th, A. D. 1877, at Newark.

IN CHANCERY OF NEW JERSEY.

Between—
JOSEPH W. MCELROY,
Complainant,
and
JAMES LUDLUM and others,
Defendants.
} On Bill, &c.

The answer of Alice Buckingham and John M. Buckingham, her husband, to the bill of complaint of Joseph W. McElroy, complainant:

These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, answer and say, that they admit that the

said complainant was employed for many years by the late firm of James Horner & Co., and that his salary had been, from time to time, increased prior to 1860, and that such salary was always regularly paid *till July* 1, 1869 *; but these defendants have no knowledge of any new arrangement made with the complainant respecting his compensation at or after that time, and do not believe that any such arrangement was in fact made, and they leave him to make such proof thereof as he may be able to do.*

And these defendants, further answering, say that they have caused the books of said firm to be examined, and have found no trace of any such new arrangement or agreement as is set forth in said bill, in any of the books of said firm, during the existence thereof, and they believe and charge that no such agreement was made ; and that they find by said books that he was paid by the said James Ludlum, surviving partner, after the death of said James Horner, the sum of upwards of fifteen thousand dollars, being his salary at the rate of three thousand dollars per year, from the first day of July, 1869, *to the dissolution of said firm, and these defendants charge that such payment was in full for all moneys due to the said complainant from said firm.*

And these defendants admit that no inventory of the estate of said firm was taken after the first day of July, 1869, while the said firm existed, and they admit that no attempt was ever made to adjust or settle the profits of said business, but they deny that if any such agreement was made as stated in said bill, there was any amount due to the complainant for any proportionate share of said profits.

And these defendants, further answering, say that they admit that James Ludlum was appointed receiver of said partnership estate after the death of the said James Horner, and that the said James Horner left a Will, wherein he made this defendant, Alice Buckingham, the sole executrix.

And these defendants, further answering, say that it is true that the complainant bought a large quantity of personal property at the sale thereof, but not from the said receiver, but from Frederick W. Ricord, a Master appointed by this Court, and paid ten per cent. on said purchase; and they admit that he has no right to take the said goods until he shall pay the full price thereof, but they deny that he has any right to set off his said purchase against any alleged claim on said estate, because they say that the said estate, in consequence of the acts of the said James Ludlum, is likely to prove wholly insolvent and insufficient to pay the just debts thereof.

And these defendants deny that the said James Ludlum has refused to permit the said complainant to examine the books and papers of said firm, and they charge that the complainant has not only had full access to and knowledge of said books, but the said James Ludlum being indebted to the said firm in the sum of about seventy-five thousand dollars, with interest from June 9th, 1874, *and being wholly unable to pay the same, has combined with the said complainant to aid him in enforcing his unfounded claim against said estate, and is endeavoring to establishing the same to the injury of the said defendants, Alice Buckingham and Susan Horner, the devisees of said James Horner, who will be entitled to receive the whole surplus of said estate after the payment of the debts thereof; and they further charge that the complainant and the said James Ludlum have conspired together to absorb and dispose of the entire property of said estate, to the injury and exclusion of the said legatees, and that the claim set up in the complainant's bill is a part of said scheme and combination, and that the said claim is unjust and unfounded, and ought not to be allowed.*

And these defendants deny all unlawful combination and confederacy in said bill charged, without

this, that any other matter or thing in said bill contained and not herein or hereby well and sufficiently answered, confessed or denied, is true to the knowledge of these defendants.

All which matters and things these defendants are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be heard and dismissed, with their costs and charges in their behalf sustained.

A. Q. KEASBEY & SONS,
Solicitors and of Counsel with said Defendants.

STATE OF NEW YORK, }
City of New York, } ss.:

ALICE BUCKINGHAM and JOHN M. BUCKINGHAM, being duly sworn, on their oaths say, that the matters and things set forth in the foregoing answer, so far as they relate to their own acts, are true, and so far as they relate to the acts of others they believe them to be true.

ALICE BUCKINGHAM.

Sworn and subscribed this }
day of March, 1877, before me. }

IN CHANCERY OF NEW JERSEY.

BETWEEN

JOSEPH W. MCELROY,

Complainant,

and

JAMES LUDLUM and al.,

Defendants.

Final Decree.

This cause coming on to be heard before the Honorable Amzi Dodd, Special Master, in the presence of John R. Emery, of counsel with the complainant, and Anthony Q. Keasbey, with the defendants, Alice Buckingham and John M. Buckingham, and the pleading, depositions, exhibits and proofs, and the arguments of the respective counsel, being heard and considered, and it appearing that the complainant is not entitled to the relief sought and prayed for by him in his said bill of complaint.

It is, on this thirtieth day of April, A. D. eighteen hundred and seventy-nine, ordered, adjudged and decreed that complainant's bill be and the same is hereby dismissed, but without costs.

THEODORE RUNYON, C.

I respectfully advise the above decree.

AMZI DODD,

Advisory Master.

April 30, 1879.

A true copy.

H. S. LITTLE, Clerk.

EXHIBIT No. 13.

ALICE BUCKINGHAM

vs.

JAMES LUDLUM.

On hearing on petition of Joseph W. McElroy and answer of receiver and proofs taken in open court.

MR. JOHN R. EMERY, for Petitioner.

MR. FREDERICK W. STEVENS, for Receiver.

VAN FLEET, V. C.

The questions now before the court for decision arise on a petition presented, in this suit, by Joseph W. McElroy, praying that an order may be made directing the receiver appointed in this cause to pay to him the sum remaining due on a judgment recovered by him against James Ludlum as surviving member of the firm of James Horner & Company. For many years prior to the 9th of June, 1874, James Horner and James Ludlum were engaged, as copartners in the manufacture of steel, at Pompton, in the County of Passaic, under the name of James Horner & Company. On the date last named the partnership was dissolved by the death of Mr. Horner. Mr. Horner left a will, by which, after a few unimportant gifts to others, he gave the whole residue of his estate to his daughter, Alice Buckingham. Very soon after the death of Mr. Horner serious disputes arose between Mrs. Buckingham and Mr. Ludlum, and in August, 1874, Mrs. Buckingham filed a bill in this court asking for the appointment of a receiver of the partnership assets, also for an account and settlement of the partnership affairs, and after the debts of the firm were paid that the surplus assets might be divided. On this bill an order to show cause was granted, and

after Ludlum had put in his answer, and both parties had been fully heard the court made an order, bearing date November 17, 1874, appointing Ludlum receiver, with power to collect and receive all moneys and other property belonging to the firm, and out of the proceeds of the property of the firm, to pay the debts of the firm, and to take and retain posession of the property, with a view to the ultimate settlement of the affairs and business of the firm under the direction of the court.

The petitioner, Joseph W. McElroy, acted as superintendent of the steel works of the firm from July 1, 1869, to the date of its dissolution. The service thus rendered, he claims, was rendered under a contract, by which the firm agreed, that he should be entitled to receive, as compensation for his services, one-eighth of the yearly profits made in the manufacture of steel, they guaranteeing that his share of the profits should not, in any year, be less than $3,000. It is admitted that the contract was not in writing, and that it was made some time before he commenced service under it, so that it was not performable within a year of its date. The petitioner, in 1877, brought an action, in this court, against Ludlum and the other persons in interest, on the alleged contract, asking an account of the profits. Ludlum answered admitting the contract; Mrs. Buckingham, by her answer, denied it, and on the issues thus raised, this Court, and the Court of Errors and Appeals both decided, that the petitioner was not entitled to an account. The decision of both Courts was put upon two grounds: first, that a definite and complete contract, such as would entitle him to an account, was not proved and second, if it had been, it could not be enforced, it being invalid by the statute of frauds.

McElroy v. *Ludlum*, 5 *Stew.*, 828.

The petitioner subsequently, on the 10th of Sep-

tember, 1880, brought an action at law against Ludlum as surviving partner, and declared on a *quantum meruit.* Mrs. Buckingham was notified of this suit by Ludlum and requested to defend it, at her own expense, and she consented to do so, but on Ludlum's refusing to put in the pleas which her counsel advised were necessary to a proper defence, she declined to interfere. Ludlum interposed a plea of the general issue, and on the trial of the action, a judgment of over $21,000 was recovered. The petitioner has attempted to enforce his judgment. He has succeeded in collecting $1,600, but the proofs render it clear, that this is all he can, at present, get by means of legal process. He has exhausted his legal remedy. His debt, he claims, is a liabilty of the firm, and should, on the plainest principles of justice, be paid out of the firm assets. All the firm assets are new in this Court, and he asks the Court to apply so much of them, as may be necessary for that purpose, to the payment of his debt.

The fact that the petitioner's services were rendered under an invalid contract, does not, in the slightest degree, impair his right to recover their reasonable value, for it is a well established legal principle, that where one person renders valuable services to another, under a contract, invalid by the statute of frauds, and the person to whom the services are rendered, after getting them, refuses to perform his part of the contract, the person rendering the services may, in such event, treat the contract as a nullity and recover the value of his services in an action on the *quantum meruit. Smith* v. *Smith's Admr.*, 4 *Dutch*, 208; *Rutan* v. *Hinchman*, 1 *Vr.*, 255; *McElroy* v. *Ludlum*, 5 *Stew.*, 828. This principle, it will be observed, is both just and logical. It is just, because it prevents the person to whom the services were rendered, from getting them without making compensation; and it is logical, because his promise, being invalid, is

no promise in law, and the matter stands, therefore, just as it would if the services had been rendered in the absence of an express promise.

Nor do I think the petitioner's right to recover in this proceeding is at all affected by the judgment of dismissal pronounced against him in his action for an account of profits. There can be no doubt, that a prior judgment, pronounced by a competent Court, between the same parties on the same cause of action, and which decides the merits of the cause of action, is conclusive upon the parties, and a complete bar to a subsequent suit. But here, it will be seen at a glance, that the two actions of the petitioner stand upon grounds fundamentally different. In the first he was seeking to enforce an express contract, which entitled him to a specific share of the profits regardless of the value of the services he had contributed in earning them ; while that which he is now prosecuting is based exclusively on the fact that he has rendered valuable services to this firm, at their request, without stipulation as to price, but under a promise, implied by law, that he should be paid what his services were reasonably worth. A judgment in the first case adjudging either that the contract on which that suit was founded, was not proved, or that the contract was invalid, it is obvious, could not touch even collaterally the question whether the petitioner had rendered services for which in justice he ought to be paid. The petitioner's present claim is unaffected in any way, in my judgment, by the judgment pronounced against him in the previous suit.

Nor do I think it can be held, that the judgment recovered by the petitioner at law, against the surviving member of the firm, binds or concludes the receiver or Mrs. Buckingham. It is, however, admissible in evidence for the purpose of showing what steps have been taken by the petitioner, by means of legal remedies, for the enforcement of his debt, and also to show that he has successfully ex-

hausted the means provided by the law for its collection. As a general rule, a judgment concludes parties and privies, but not strangers. And by parties is meant all those who had a right to make defence, or to control the proceeding, and to appeal from the judgment. Persons not having these rights are regarded as strangers. And by privies is meant such persons as are privies in estate, as donor and donee, lessor and lessee, and joint tenants; or privies in blood, as heir and ancestor, or administrator and intestate; or privies in law, where the law without priority in blood or estate, casts land upon another by escheat. Taking this as the rule of decision, it is clear that the receiver and Mrs. Buckingham stand as strangers to the petitioner's judgment, and in this proceeding may lawfully contest both his right and the amount of his debt. Chancellor Walworth twice decided that a judgment against the surviving partner did not bind the representatives of the other partner. *Smith* v. *Ballantyne*, 10 *Paige*, 103; *Orphan House* v. *Lawrence*, 11 *Paige*, 83.

The case stands then in this position: the petitioner has rendered valuable services to this firm, for which, he alleges, he has not been paid; he has established his debt against the surviving partner by a judgment at law, and has unsuccessfully exhausted all the means the law provides for its enforcement; this Court, at the instance of the representative of the deceased partner has taken possession of all the firm property and it is now subject to its order; the petitioner's debt, if honest and legal, is a valid charge, both at law and in equity, against the firm assets, and ought to be paid out of them; they can only be reached through the intervention of this Court. In this condition of affairs, it seems plain, that, in order to prevent a failure of justice, this Court is bound to hear the petitioner's appliances, and if his debt is found to be just and legal, to direct its payment.

No objection is made to the method in which the petitioner seeks relief. It is not insisted that relief of the nature asked can only be given in a suit regularly brought, to which all persons in interest are made parties and afforded an opportunity to make defence. In addition to those already discussed, the petitioner's application is mainly resisted on two grounds: first, that he has already received full compensation; and second, if he has not, his remedy is barred by the statute of limitations.

Compensation to the extent of $3,000 a year has already been made. This, it is insisted, is all the petitioner's services are reasonably worth. I cannot concur in that view. Careful and patient consideration of the evidence has produced a strong conviction in my mind that his services were worth more and would readily have commanded more in a rival establishment. At the time of the commencement of his services in 1869, he had been a worker in iron for over twenty-five years; he had invented and patented a process for making steel from pig iron; the firm had become the owners of the patent, but found that others could not use it as skillfully and advantageously as he could; just before the commencement of his service, the petitioner had determined to leave the firm and go to Connellsville, Pa., and take service in Steel Works there, in which he had a pecuniary interest; he abandoned this project, at the instance of the firm, and on the faith of their offer. The services he rendered the firm was skilfull, constant, faithful and highly beneficial; under his superintendence the capacity of their works was enlarged and their product increased; he supervised the process of manufacture from its inception to completion; so great was the confidence of his employers in his skill and judgment that neither gave any attention to that department of their business which was conducted under his management. No fault is found either with the quality or

extent of his work. It is admitted that he was skillful and faithful, and that his services were very valuable. This being so, the question is, what does he reasonably deserve to have? If the services rendered were such as are in general demand, their value may be shown by proof of what is usually paid for like services to others, possessing similar skill, experience and judgment. The customary rates are then the criterion of market value. In such cases, the Court may properly receive evidence of the compensation paid to others, possessing like qualifications for similar services. Such evidence has been offered in this case. This evidence, considered in connection with that which shows the character and extent of the petitioner's services, has strongly persuaded me that he fairly deserves to have a compensation of $4,000 a year. His experience and skill would, I am convinced, have commanded an annual salary of that amount in almost any rival establishment. My mind has hesitated between the sum just named and a larger one. His services were unquestionably of great value; if they were not the main cause of the firm's prosperity, they contributed largely to it; they were rendered, as I believe, under a confident expectation that he was entitled to participate in the success of the business, and the greater its success, the larger his compensation would be. His hopes naturally stimulated his zeal and induced him to do his utmost. I am not sure that the sum allowed affords adequate compensation, but, after much reflection, I am satisfied it more nearly approaches what is just and fair, under the circumstances, than either a larger or smaller one.

The remaining question is: Is the petitioner's remedy, against the partnership assets, in the hands of the Court, barred or not by lapse of time? His debt was in full force, and his cause of action perfect when this Court took possession of the partnership assets. His term of service commenced July

1st, 1869, and closed June 9th, 1874, and the receiver was appointed November 17th, 1874. As already stated, the order appointing the receiver empowered him to pay the debts of the firm. In this respect, it followed the prayer of the bill. It will be remembered that Mrs. Buckingham, by her bill, among other things, asked that Ludlum should be required to account that the partnership affairs might be settled, and after the debts of the firm were paid, that the surplus assets might be divided. Now, if the order appointing the receiver created a trust in favor of the creditors, it is entirely clear, I think, that their debts were relieved from the operation of the statute of limitations. The trust was one which this Court alone could administer and enforce. Not a penny of the money realized from the trust property could be applied except in accordance with the orders of the Chancellor. The rule is settled. Trusts which are not cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of Courts of Equity, are not subject to the statute of limitation. *Wanmaker v. Van Buskirk*, *Sax.*, 691; *Marsh v. Oliver*, 1 *McCart.*, 262; *McClane's Administratrix v. Shepherd's Executrix*, 6 *C. E. Green*, 76. Chancellor Kent defined the rule as follows: "The trusts which are not within the statute of limitations are those which are the creatures of Courts of Equity, and not within the cognizance of a law Court, and that as to those other trusts, which are the ground of an action at law, the statute is, and in reason ought to be, as much a bar in one Court as in the other." (*Kane* v. *Bloodgood*, 7 *Johns. Ch.*, 113). And Judge Story, in speaking on the same subject, said: "As to cases of merely constructive trusts, created by Courts of Equity, or cases which are treated, for some purposes, as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them."

Robinson v. *Hook*, 4 *Mason*, 152. Now, it is undoubtedly true, as a general rule, that the mere appointment of a receiver does not suspend the operation of the statute, or vary the position of the parties to the litigation under it. (*Harrisson* v. *Duignan*, 2 *Dru. and War.*, 301). But it is also true that when it is necessary for the Court to protect its jurisdiction, and accomplish the purposes for which it took charge of the subject in dispute, it will hold that its interference suspended the operation of the statute, and it will adjudge the rights of the parties, as they stood, at the time its jurisdiction attached. (*Wrixon* v. *Vize*, 3 *Dru. and War.*, 123). In this case, it will be observed, the Court did something more than it ordinarily does in such cases, simply take charge of the property in dispute, pending the litigarion, to provide for its safety and see that it is preserved. At the instance of Mrs. Buckingham, and with the consent of Ludlum—for the order appointing him receiver was made with his consent—the Court took charge of the partnership effects for the purpose of liquidating the partnership affairs; to collect the assets, to pay the debts, ascertain the surplus remaining for distribution and the rights of the parties therein and making final distribution. Suppose this had been effected by a voluntary arrangement between the parties, expressed in writing and properly executed, can it be doubted that a trust would have been created in favor of the creditors which would have relieved their debts from the operation of the statute? The Supreme Court of Pennsylvania expressly decided, in *Hecker's Appeal*, 24 *Penn St.*, 482, that where a debtor makes an assignment of all his estate, for the benefit of his creditors, an express trust is created in behalf of his creditors which relieves their debts from the operation of the statute; and that the assignor cannot set up the bar of the statute against a debt which was alive when the assignment was made, but was not paid until after

it had been due more than six years. Judge Woodward, in delivering the opinion of the Court, said: "We are of opinion the statute of limitations has no application here. This was a direct and continuing trust, and was exclusively cognizable in a Court of Equity. Such a trust is not touched or affected by the statute of limitations."

The judicial action taken in the case under consideration effected, substantially, the same result that a debtor, who makes an assignment for the benefit of his creditors, accomplishes by his own voluntary act. He makes over his property in trust, first, for the payment of his debts, and second, if anything shall be left, that it may be returned to him. The Court here, at the instance of the litigants, sequestered the partnership property, first, for the payment of the debts of the firm, and second, to enable it to adjust the rights of the parties in the surplus assets, and then make a division of them in accordance with such adjustment. Can it be successfully contended that such a sequestration, because it is effected by judicial action taken in the due course of the administration of justice and with the consent of the litigants, is less effectual for the protection of the creditors, whose right it was, at the time of the sequestration, to look first, and to the exclusion of all others, to the property sequestered, for the payment of their debts, than a voluntary assignment, made for the same purpose, would be? I do not think it can.

But, whether the action of the Court created a trust or not, it is clear, I think, that, in taking possession of the partnership property, the Court changed the remedy of the creditors against the assets, from a legal to an equitable remedy. After the assets were in Court, they could not be reached or touched except by permission of the Chancellor. No action at law would lie against the Receiver for the debts of the firm, nor could such an action be maintained against the representative of the de-

ceased partner, and a judgment against the surviving partner would be utterly ineffectual against the property under the control of this Court. No levy could be made upon it without the permission of the Chancellor. It may safely be said then, that after the partnership assets were in Court the remedy of the creditors of the firm against them was exclusively equitable. To such remedies the statute of limitations does not apply. Courts of Equity are not within the terms of the statute, and while they follow it by analogy, and have adopted as a rule, the limit of six years, in analogy to the statute, as the time within which a suitor, in certain cases, must bring his action, yet they do not adhere to it so inflexibly as to feel obliged to deny relief to every suitor who asks their aid after the expiration of the limited time. The rule on this subject is expressed as follows by one of the Vice Chancellors of England: "Where the circumstances of the case are such as to make it against conscience to apply the rule founded upon this analogy, the Court will not enforce it. It has been said, that if a creditor files a bill on behalf of himself and others, and permits it to be dismissed before decree, the statute would apply. I dissent from this proposition, for I think that the Court would protect a creditor against an accident of that kind. I have no doubt that, if a creditor intended to file a bill, and it appeared that the rule adopted by analogy to the statute would affect his demand, but that a bill had been filed before, by another creditor, and that he had, in confidence that the former suit would be prosecuted, abstained from filing his bill, the Court would not apply its rule." (*Sterndale* v. *Hankinson*, 1 *Sim.*, 398.) Lapse of time does not bar the debt, but simply the remedy, and in deciding whether the creditor has lost his remedy or not, Courts of Equity generally govern their action by the principle laid down by Lord Camden, in *Smith* v. *Clay*, 3 *Bro. C. C.*, 639: "A Court of Equity,

which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the Court is passive and does nothing."

The proofs show, I think very clearly, that since the dissolution of the firm the petitioner has neither slept upon his rights, nor been slothful in their pursuit. Indeed, the judicial records of the State bear testimony, that since 1877 he has been engaged in an almost constant struggle in the Courts to secure their vindication. Prior to that time he had been lured into inaction. Mr. Ludlum swears, that after his appointment as receiver, the petitioner delayed presenting his claim, in legal form, at his request, and upon his representation that the Court would give it attention at the proper time. This representation may have been unauthorized and Mr. Ludlum's promise without legal force against the persons standing in the rights of his deceased partner, but, upon the question whether the petitioner has been guilty of such laches, as should in conscience bar his remedy, they are of the utmost importance. The evidence shows that the petitioner has not lacked diligence; he has been vigilant, but mistaken. At the outset he misconceived his remedy, but for that the questions now before the Court would have been settled long ago. To declare, in such a case, that the suitor is barred of his remedy, by his laches, would, according to my judgment, be an abuse of the rules of justice.

But another rule of equity jurisprudence, pertinent to the question under consideration, remains to be mentioned. It has long been settled, that a creditor of a firm may have relief in equity, for the payment of his debt, against the separate assets left

by a deceased partner, if the surviving partner be insolvent and the firm assets exhausted. Lord King so held as early as 1692. *Lane* v. *Williams*, 2 *Vern.*, 277 *and* 292. Lord Elden recognized this doctrine in *Gray* v. *Chiswell*, 9 *Ves.*, 118, and in *ex parte Kendall*, 17 *Ves.*, 513, and Sir William Grent affirmed it in *Devaynes* v. *Noble*, 1 *Mer.*, 564. And Chancellor Kent applied it, in all its length and breadth, in *Hamersley* v. *Lambert*, 2 *Johns. Ch.*, 508. There the firm was dissolved in 1803, by the death of one of the partners. The surviving partner made a payment on account of the complainant's debt in 1806, and on January 1st, 1807, admitted the sum remaining due at that date, and in October, 1807, was discharged under the insolvent laws of the State of New York. In 1809, the guardian of two of the infany heirs of the deceased partner, paid certain moneys into Court belonging to his wards, which were afterwards invested in public stocks. In May, 1814, eleven years after the dissolution, the complainant filed his bill, asking a decree that his debt be paid out of the public stocks which from the time of their purchase remained in Court. The Chancellor, after recognizing the doctrine established by the prior adjudication, said, "that delay, nor lapse of time, nor dealing with the survivor, nor calling for and receiving part of the debt from the survivor, amounted to a waiver or bar of the complainant's remedy against the assets in Court," and he made a decree directing the payment of the complainant's debt out of the fund in Court. And Lord Cottenham, in a more recent case, seem to have been of opinion, that the representatives of a deceased partner could not successfully set up the Statute, against a creditor of the firm, so long as the surviving partner had a right to call upon the estate of his deceased partner to contribute to the discharge of the liabilities of the firm. In *Winter* v. *Junes*, 4 *Myl. and Cr.*, 110, *he said:* "When the simple case shall occur of the

representatives of a deceased partner setting up the Statute of Limitations against a claim by a creditor of the firm, it will be to be considered whether such a defence can prevail whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribute at the suit of the surviving partner. If the equity of the creditor to go against the estate of the deceased partner is founded upon the equity of the surviving partner against that estate, it would seem that the equity of the creditor ought not to be barred, so long as the equity of the surviving partner continues, as that would be to create that circuity which it is the object of the rule to prevent." It is a familiar principle of equity that a creditor may in collecting his debt, avail himself of all the securities and remedies of his debtor. This is the doctrine which I think the Court would be bound to apply if the petitioner was here seeking relief, not against the partnership assets, but against the separate estate of James Horner, deceased. His present position I think, gives him higher and stronger equities. He is here seeking relief against the fund which, by law and by right, stands primarily liable for the payment of his debt, and which would ultimately have to pay it, even if it were possible for him to collect in the first instance from some other source. This being so, I think it would be a denial of justice to refuse him relief.

There can be no doubt under the rule laid down in *Todd v. Rafferty's Admnrs.*, 3 *Stew.*, 257, and in the same case on appeal, 7 *Stew.*, 152, that for any payment Ludlum has made, or may hereafter make, in discharge of the petitioners' debt, he will be entitled to allowance for in the final settlement, for it was there held, that one partner cannot set up the bar of the statute against the other in a case where there have been dealings, in respect to the partnership affairs, within six years, whether they consist in the conversion of assets into money, or the ap-

plication of assets in discharge of liabilities; and that the statute does not begin to run against each item from the time it becomes part of the account, but if part of the account be within six years, that part draws after it the items before six years, so as to protect them from the operation of the statute.

The petitioner is entitled to relief. In my judgment he reasonably deserved to have $4,000 a year for his services, amounting in the whole to $19,766,68. Of this sum he has already received $15,000, leaving $4,760,68 still due. For this sum with interest, he is entitled to an order, together with costs.

EXHIBIT No. 14.

IN CHANCERY OF NEW JERSEY.

BETWEEN—	
ALICE BUCKINGHAM, Executrix of JAMES HORNER, dec'd, Complt.,	On Bill, &c., and Petition Joseph W. McElroy for payment of damages.
and	
JAMES LUDLUM, Deft.	

This matter coming on to be heard before his Honor, Abraham V. Van Fleet, Vice-Chancellor, upon the petition of Joseph W. McElroy, the rule to show cause granted therein, the answer of the respondent Andrew Kirkpatrick, the Receiver appointed in the above cause, and upon proofs taken before the Court in the presence of John R. Emery, solicitor for the petitioner, and of F. W. Stevens,

Esq., solicitor for the respondent, and the Court having read, heard and considered the papers in the cause, and the proofs and the arguments of counsel thereon, and the Court being of opinion that from the first day of July, eighteen hundred and sixty-nine, until the first day of June, 1874, when the firm of James Horner and Company was dissolved by the death of James Horner, as set out in the bill filed in this cause, the said petitioner was on the

contract implied by law on the part of said firm to pay him therefor so much as his said services were reasonably worth, and the Court upon consideration of the evidence and proofs in the cause. being of opinion that the said services of the said petitioner during the said time were reasonably worth the sum of $4,000 per year, and that he is entitled to be paid at that rate, making for the whole of said time the sum of nineteen thousand seven hundred and seventy-six dollars and sixty-eight cents ($19,776.68); and it further appearing to the Court that the said petitioner has already and before presenting his claim to the said Andrew Kirkpatrick, Receiver, on the 26th day of July, 1880, received from the said firm the sum of fifteen thousand dollars ($15,000) on account of said services, and it also appearing that on or about the 14th day of May, 1880, the said petitioner collected by execution against said James Ludlum on the judgment set out in said petition the sum of six hundred dollars, and the Court being of opinion that the same should be credited as a payment on account of the claim or debt hereby found due, and the Court finding that the balance due to said petitioner on said claim after deducting said payment and collecting and allowing interest to this date on said claim from the time of presenting the same to the Receiver, is the sum of five thousand and thirteen dollars and seventy-eight cents ($5,013.78); and it further appearing to the Court that the said petitioner is not

by reason of anything set up in the answer of the said Andrew Kirkpatrick, Receiver, barred or foreclosed from receiving the said balance due with interest as aforesaid, and from having the same paid out of the assets of the said firm now in the hands of said Receiver, and good reason appearing therefor.

It is hereupon, on the eighteenth day of October, A. D. eighteen hundred and eighty-three, ordered, adjudged and decreed, that the said Andrew Kirkpatrick, Receiver as aforesaid, out of the assets in his hands as Receiver of the said firm of James Horner and Company, do pay to the said Joseph W. McElroy, or to his solicitor, the said sum of five thousand and thirteen dollars and seventy-eight cents ($5,013.78), being the balance this day due to the said petitioner for principal and interest upon the balance due him from the said firm on the claim for services mentioned in said petition, and do also out of the assets aforesaid pay the costs of the said petitioner in this proceeding, to be taxed.

Respectfully advised,

A. V. VAN VLEET,
V. C.

EXHIBIT No. 15.

IN THE COURT OF ERRORS AND APPEALS.

Between—
ANDREW KIRKPATRICK, Receiver, &c.,
Appellant,
and
JOSEPH W. McELROY,
Respondent.

On Petition.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The humble petition of Andrew Kirkpatrick, Receiver of the late firm of James Horner and Company, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, bearing date on the eighteenth day of October, eighteen hundred and eighty-three, wherein the said Joseph W. McElroy was petitioner andthe said Andrew Kirkpatrick, Receiver, as aforesaid, was respondent in this respect, to wit: for that the said decree adjudges that the said petitioner is not by reason of anything set up in the answer of the said Andrew Kirkpatrick, receiver, as aforesaid, barred or prevented from receiving the balance of five thousand and thirteen dollars and seventy-eight cents ($5,013.78) named in said decree with interest, and for that the said decree also adjudges that the services of said petitioner to said firm during the time mentioned in said decree were reasonably worth the sum of four thousand dollars per year, and that he is entitled to be paid at that

rate, making for the whole of said time the sum of nineteen thousand, seven hundred and seventy-six dollars and sixty-eight cents, and for that said decree also adjudges and decrees that the said receiver, out of the assets in his hands, as receiver of said firm, pay to the said Joseph W. McElroy, or to his solicitor, the sum of five thousand and thirteen dollars and seventy-eight cents, as being the balance of said sum of nineteen thousand, seven hundred and seventy-six dollars and sixty-eight cents, due on the date of said decree, to said petitioner, for principal and interest upon the balance due him from the said firm, on the claim of services mentioned in said petition, and that he do also pay out of the assets aforesaid the costs of the said petition in this proceeding, to be taxed.

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said Court ought to have adjudged that the defences set up in the answer of your petitioner constitute a complete bar to the claims of said McElroy, as set forth in his petition filed in the Court of Chancery; and for that said Court ought to have adjudged and decreed that the services of said petitioner were reasonably worth far less than said sum of four thousand dollars per year, and that they had been completely paid and satisfied prior to the filing of said petition, and that no balance was due to him therefor.

Your petitioner, therefore, prays that the said decree of the said Chancellor may be in the particulars aforesaid, reversed, set aside, and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court may seem meet.

FREDERIC W. STEVENS,
Sol. and of Counsel with Appellant.

In the Court of Errors and Appeals

OF NEW JERSEY.

JOSEPH W. MCELROY,
Respondent,

against

ANDREW KIRKPATRICK, Receiver of the late firm of JAMES HORNER & COMPANY,
Appellant.

Appellant's Brief.

This is an appeal from a decree of the Court of Chancery adjudging that the late firm of James Horner & Company is indebted to the respondent in the sum of $5,013.78, and also from the further order entered in respondent's favor, for costs.

Statement of the Case.

The proceeding was brought in 1881 in Chancery on the petition of the respondent for an order directing the appellant to pay to him (respondent), the sum of $21,300 out of the assets of the estate, for which sum a judgment had theretofore been entered in his favor, in a suit in the Supreme Court, in which the respondent was plaintiff and James Ludlum, as surviving partner, was sole defendant,

for an alleged balance due the respondent for work and labor performed by him as superintendent of the steel works of the late firm of James Hornor & Co. between July 1st. 1869, and June 9 1874, and also for the costs recovered by him in said suit (pages 1 to 5, and 160 of case).

To the petition so filed the appellant filed his answer, admitting, among other things, the recovery of the judgment, charging, however, that the suit in which the judgment was obtained was prosecuted through the connivance and collusion of Ludlum, and denying that the judgment was effectual to charge Ludlum in any other than his personal capacity. For further answer the appellant set up that in 1877 respondent filed his bill in this Court against Ludlum and wife, Alice Buckingham, and her husband, and Susan Horner for an account of the profits of the steel works of the firm from July 1st, 1869, to June 9th, 1874, claiming to be entitled to one-eighth thereof as an additional salary. Ludlum answered, admitting the claim. The Buckinghams answered, denying the claim and alleging further that the claim of respondent was paid in full, on an account stated and settled. That on April 30th, 1879, the bill was dismissed on the merits, and the appellant charged that such adjudication was final between the parties in respect to any claim for compensation for work and labor performed by respondent, and was a complete bar both in law and equity to this proceeding. That on September 10th, 1880, the respondent commenced an action at law (being the action in which the judgment for $21,300 was recovered) to recover compensation for the alleged services during the period stated; that the foundation of the action was the same as the one in equity, and that Ludlum allowed judgment to be taken by default, and that the judgment so obtained (and which it is sought to have paid by this proceeding) is not binding on the estate, but can stand good only against Ludlum personally, and that the claim in respect of which such judgment was recovered is illegal. First, be-

cause barred in the manner mentioned; secondly, because the respondent, before the commencement of the action, had been fully paid, and thirdly, because such claim, even if valid, was, at the time of the commencement of the action, barred by the Statute of Limitation (pages 6 and 12).

From the facts presented by the petition and the prayer thereof, it is clear that the respondent simply sought to enforce against the partnership estate, the judgment which he recovered against Ludlum as surviving partner, *even though* in the suit in which the judgment for $21,300 was rendered the partnership was in no way represented. *The prayer of the petition asks not only that the Court direct the Receiver to pay the judgment, but demands in the usual way such further relief as shall seem meet to the Court.* The facts set up in the appellant's answer show first, that the judgment so rendered in McElroy's favor was procured through Ludlum's collusion and connivance, but that independent of that fact the judgment against the partnership estate is a mere nullity, because neither the Receiver nor Alice Buckingham, the Executrix of James Horner, were made parties to the suit in which such judgment was obtained. This answer sufficiently controverts all that the petitioner expressly demands. It denies the validity of the judgment sought to be enforced against the partnership estate, and inasmuch as that was the only issue which could be raised from the petition, there was no necessity for further answer. The appellant, however, out of abundant caution, by reason of his trust relation, and in order more fully to protect and preserve the estate, then and there, and in the same answer, further set up, that the claim on which the judgment was rendered could not, at that time, be enforced against the estate.

First, because the identical claim had previously been adjudicated;

Secondly, because barred by the statute of limitation ; and,

Thirdly, because the claim had been previously paid.

To that part of the answer denying the right of the respondent to enforce the judgment in his favor against the estate, no replication was necessary.

To the new matter, however, set up in the answer no replication was filed ; what the legal effect of such omission is will be adverted to presently ; suffice it here to say that if the respondent omitted to file a replication to the new matter because the relief demanded by the petitioner (to wit, the direction of the Court to order his judgment paid) did not admit of such new matter to be pleaded against the judgment, then the only relief which could be granted the respondent under the pleadings was either to order his judgment paid or to refuse the relief because of some infirmity in the judgment. On the other hand, if it was contemplated by the respondent then and there and in the same suit under his prayer for further relief to submit to the Court (in case the Court refused to enforce the judgment against the estate) *his common law claim on quantum meruit*, then it was necessary to reply to such new matter, inasmuch as the hearing on such claim would be substantially a hearing *de novo*, and an issue had to be raised upon such defenses by a traverse of them before proceeding to trial. The parties proceeded to trial on the petition and answer. On the trial it was insisted by counsel for the appellant, first, that the judgment of the respondent against Ludlum was obtained by fraud and collusion with Ludlum, and, secondly, it was void against the partnership estate, because neither the Receiver of the partnership estate, nor Mrs. Buckingham, the executrix of the deceased Horner, were made parties

to the suit. In reference to the first proposition, counsel for the appellant showed to the Court that in the proceeding in the Supreme Court, in which respondent was plaintiff, and Ludlum, as surviving partner, was defendant, Ludlum permitted judgment to be entered against him by default. After the judgment was entered against him by default, Ludlum applied to Mrs. Buckingham (she was not, however, a party to the suit) and asked her to assist him in opening the default. Mrs. B., in pursuance of this request, instructed her counsel to assist in such application, which, on being made, resulted in setting aside the default and the judgment, and allowing Ludlum to defend. Counsel for Mrs. Buckingham thereafter prepared an answer for Ludlum, setting up, first, payment, and secondly, the Statute of Limitations. This answer was returned, accompanied by a letter from Ludlum, flatly refusing to set up such defences, for fear that certain evidence given by him before one Romaine would stultify him, &c., &c. (see Ex. No. 6, page 166 of case). Thereafter, Mr. R. L. Lawrence, his counsel, answered, pleading the general issue thereto (see Ex. No. 7, page 166 of case.) Subsequently a letter was written at Ludlum's request, to Mrs. Buckingham's counsel, notifying him that the case was noticed for trial, and stating that Ludlum was willing to have Mr. Buckingham take part in the trial of the case (see Exhibit Nos. 8, 9 and 10, p. 167). The trial of the suit was subsequently had, and judgment rendered in favor of McElroy for $21,300, substantially by default, and is the same judgment sought to be enforced in this proceeding. This evidence, however, showing just how this judgment was obtained, though not relied upon as a defence to this present suit, was nevertheless introduced to show the animus of Ludlum, and to show that the judgment was obtained by collusion between him and the respondent. The second proposition, however, raised by counsel on the trial of

this proceeding, and the important one was, that the Court was without power to direct the appellant to pay the judgment, for the reason that the judgment so obtained was a mere nullity against the partnership estate, inasmuch as the estate was not in any away represented in the suit. This point the Court sustained (see opinion of Vice-Chancellor, pages 186 and 187). The sustaining of this point, it is submitted, disposed of all the material issues raised by the pleadings. All the respondent asked was to have his judgment paid out of the partnership estate, and the Court having refused him that relief, nothing further was left for the Court to do. But the Vice-Chancellor did not stop here ; though he denied the respondent the relief demanded, he nevertheless turned himself from a Court of Equity into a common law Court, and heard the claim of the petitioner on a *quantum meruit*, being for the same services on which this fraudulent and void judgment was founded. To this claim the appellant set up the three defenses, stated. No replication was filed to such new matter and defences, and the omission to so file the same was in effect an admission of the truth of the defenses; and under the general rules of practice, either of a court of law or equity, judgment ought to have been rendered in favor of the appellant.

If now it is assumed that the three defenses were impliedly traversed and a direct issue raised, did the Chancellor under the pleadings have jurisdiction to try the respondent's claim *on quantum meruit*, and if so, was he not bound, by reason of the legal character of the claim, to apply the rules of a court of law in determining the same? We submit that if the Court had power to hear the same, it was bound by the rules of a court of law.

The Chancellor, after deciding that the judgment was invalid, directed the parties to proceed, and on the evidence adduced rendered a judgment in favor

of the respondent for $5,013.78, disregarding entirely the defenses set up in the answer.

Point I.

The Chancellor having determined that the judgment rendered in favor of the respondent was void against the partnership estate, no power was vested in him to adjudicate the petitioner's claim de novo on quantum meruit.

The respondent recovered a judgment against Ludlum, individually, for $21,300 for work and services alleged to have been performed for the firm of James Horner & Co. This judgment so obtained against Ludlum, the respondent wanted paid out of the assets of the partnership estate. The usual and ordinary mode of enforcing the payment of a judgment to wit: by execution could not be resorted to in the present case, for the reason that the assets of the estate were in the custody of the Court and in the hands of a Receiver (the appellant herein). The respondent, therefore, petitioned the Court of Chancery, praying for an order that the appellant, as Receiver, be directed to pay the judgment. It was insisted that this judgment could not be paid out of the partnership assets, for the reason that the judgment was not against the firm, but only against Ludlum individually. This objection the Chancellor sustained, holding the judgment as against the partnership and the heirs of Horner void.

(See Opinion of Chancellor, p. 187.)

The Chancellor, after declaring void the judgment against the partnership, proceeded to determine the claim of respondent on *quantum meruit*. This it

is submitted he had no power to do. Firstly, because no such relief was prayed for; and secondly, even if demanded, a Court of Equity has no jurisdiction to determine a claim purely legal in its character, if the remedy at law is adequate.

The fact that a Receiver has been appointed over a partnership estate does not turn the demands against it into equitable claims, so as to give a Court of Chancery exclusive jurisdiction. Nor is it enough to say that the Chancellor had the power to determine all the rights of the parties, as between themselves, in the proceeding before him; this a Court of Chancery, to avoid a multiplicity of suits, will generally do; but, even then, it is governed by the pleadings, as to whether the relief can be granted. In the case at bar, further relief is demanded in the usual manner; but, if further relief could have been granted it must have been equitable relief, and not such as a common law alone could grant.

The claim, on *quantum meruit*, was properly triable before a Court and jury, and not before a Chancellor who exercises entirely different functions.

If the respondent has any claim against the partnership estate, it should have been presented and prosecuted by the ordinary count in debt, and a direct issue raised upon it. There is no such pleading as a petition at law, nor is an action in equity brought by petition: the petition filed by the respondent herein, was merely incidental to the suit in which the judgment was obtained, and when the Chancellor denied the relief prayed for, to wit, to order the appellant to pay the judgment, his jurisdiction over the matter wholly ceased.

The Chancellor, however, in his opinion at page 188, states that "No objection is made to the method in which the petitioner seeks relief." "It is not insisted that relief of the nature asked can only

be given in a suit regularly brought, to which all persons in interest are made parties and afforded an opportunity to make defence." It is submitted, with all due deference to the learned Chancellor, that no consent to proceed in the manner stated is disclosed by the record, nor was such consent in fact given. The fact that no objection was made cannot be construed, or urged, as a waiver of any rights which either the appellant or the representative of the deceased partner may have had. The question is wholly jurisdictional, and cannot be waived. It is well settled that jurisdiction can neither be waived or created by consent.

Coffin *v.* Tracy, Coleman & Caines, 470.
S. C., 3 Caines, 129.
Dudley *v.* Mayhew, 3 Comstock (N. Y.), 9-12.
Daykin *v.* Demming, 6 Paige, 95.
Heyer *v.* Burger, Hoffman Ch., 1.
McMahon *v.* Rauhr, 47 N. Y., 67.
Shaw *v.* Shaw, 12 Johnson, 257.
Davis *v.* Packard, 7 Peters, 276.

Nor is want of jurisdiction waived by an appearance to contest.

Grocers' Bank *v.* Clark, 31 Howard Pr., 115.

Nor is it enough to say that, inasmuch as the objection was not made below, it cannot be taken on appeal. It is well settled that a defect of jurisdiction in a Court below may be set up for the first time on appeal.

Ex parte Livingston, 34 N. Y., 555.
Jones *v.* Transportation Co., 50 Barbour, N. Y., 193.
Brookman *v.* Hammil, 43 N. Y., 554.
Latham *v.* Edgerton, 9 Cowen, N. Y., 227.

The equitable powers only of the Court below were invoked, and the respondent having failed to show himself entitled to any relief under his petition the Court erred in determining the rights of respondent on *quantum meruit.*

Heywood *v.* The City of Buffalo, 14 N. Y., 534, 537, 540.

So, it was held that, in an action commenced and tried by the Court as an action in equity, the plaintiff therein seeking upon various allegations equitable relief and equitable relief only, the Court, finding that the plaintiff is not entitled to any equitable relief, cannot, upon certain facts appearing upon the trial which would warrant an action by the plaintiff for damages, but which he has neither alleged or claimed, assess or cause to be assessed such damages and order judgment therefore against the defendant.

Bradley *v.* Aldrich, 40 N. Y., 504.
See also Mann *v.* Fairchild, 3 Court of Appeals Decisions, N. Y., 152.

The power of a Chancellor to hear an action purely legal in its character was but recently investigated in this Court in the case of

Palys *v.* Jewett, 5 Stewart 304:

Where it was *held* "that no precedents or warrants whatever existed for such a practice, and that such a course is contrary, as it would appear, to fundamental rules."

See also cases cited.

The case of Palys *v.* Jewett was founded in tort. The claim in the present case is founded on implied contract. Both cases, however, were brought to recover unliquidated amounts. If a Court of Chancery will exercise the right of hearing purely a legal

claim, it is enough to say that the tribunals of law and equity, which are wholly seperate and distinct is, after all, but a mere form, and a Court of Chancery could administer all the law without the necessity of the former tribunal.

That a claim for services rendered is purely a legal one requires no comment; that being true, it is confidently submitted that when the Chancellor held the judgment against the partnership estate invalid no further power was vested in him to hear the claim of respondent *de novo*, and that the rendition of the judgment in favor of respondent for the services alledged to be performed by him was error.

If it should be found, however, that the Court below did in fact have jurisdiction and power to grant relief to the respondent on *quantum meruit*, the next question is whether or not the defences set up in the answer, and above referred to, were good defences, inasmuch as the hearing of the question was practically one *de novo*. We insist that they were and that the respondent could not entertain an action for services rendered, because that question for the identical services herein recovered for was finally and judicially determined against him in the former action. This leads to

Point II.

The claim of respondent having once been litigated and the case having been heard on all its merits and dismissed, such former adjudication is a complete bar to this proceeding.

In February, 1877, the respondent filed his bill in the Court of Chancery, against James Ludlum, as receiver, and individually, and Alice Buckingham, executrix of the deceased partner, James Horner,

and John M. Buckingham, her husband, and the heirs of Mr. Horner, setting out an alleged contract to the effect that from July 1st, 1869, and thereafter, he was to have as compensation, as salary for his services as superintendent of the steel works of J. Horner & Co., one-eighth of the profits of said steel works, while he should remain in their employ, guaranteed to be not less than three thousand dollars in each year, and that he rendered service under this contract until June 9th, 1874, and admitting that he had been paid for such service at the rate of three thousand dollars per year, and demanded an accounting for his one eighth of the profits. (See complaint in that action, Exhibit No. 12, in this proceeding, from pages 169 to 174 of case.)

To this complaint Ludlum answered as receiver and individually, admitting all the allegations in the complaint except the amount claimed to be due respondet, as profits. (See his answer, Exhibit No. 12, from pages 175 to 177 inclusive of case.)

The Buckinghams answered that they have caused the books of J. Horner & Co. to be searched for such new agreement, and that said books showed no trace of any such agreement, and they denied that any such was made, and they further answered. "That he (McElroy) was paid by the said James "Ludlum, surviving partner, after the death of "said James Horner, the sum of upwards of fifteen "thousand dollars, being his salary at the rate of "three thousand per year from the 1st day of July, "1869, to the dissolution of said firm, and these "defendants charge, that such payment was in full "for all moneys due to the said complainant from "said firm." (See answer of Buckinghams, Exhibit 12, from pages 178 to 181 of case.)

The answer of the Buckinghams in that suit put in issue all the claims which respondent had against the firm of J. Horner & Co. for services rendered to the firm from the first day of July, 1869, to June 9th, 1874, by pleading payment of the account in full and satisfaction of all demands for such ser-

vices, no matter under what basis they were charged or rendered.

The action came up for trial before the Hon. Amzi Dodd, a Master in the Court of Chancery, who, after the submission of the cause to him and a careful consideration of the same, *held:* First, That the alleged contract sued upon was in fact never made by the firm of James Horner & Co. and, Secondly, if such a contract did in fact ever exist it rested entirely in parol, and was therefore void under the Statute of Frauds. (See his opinion in case on former appeal.) The bill was thereupon dismissed on the merits (see Decree, page 182). An appeal was taken from this decision, to the Court of Errors, who affirmed the decree of the Court below (see McElroy *v.* Ludlum, 5 Stewart, p. 828).

Subsequently the respondent brought another action against Ludlum on *quantum meruit*, for the same services rendered during the same time, claiming to be entitled to recover there for what they were reasonably worth, but basing his right to recover such sum on the identical contract (to wit, the one allowing him in addition to his salary one-eighth of the profits of the firm), which both the Court below and this Court found never existed. It was in this action that the respondent recovered the judgment of $21,300 against Ludlum. It is submitted that the former suit is a complete bar to any action by the respondent for services rendered to the firm, and that Ludlum, if he had pleaded such defense, could and would have prevailed in that action. If a contract is void under the Statute of Frauds, the right to recover on implied contract unquestionably is preserved, but in the case at bar no such right exists for the reason, that the alleged contract sued upon by the respondent was found by this Court never to have been made, and inasmuch as that fact is established, the first suit completely bars respondent to recover from the firm any sum whatever for services rendered in addition to his salary, and as that was the only claim made (his salary having been paid in

full as admitted in his bill), he is estopped now from reasserting it. (See Opinion of V. C. Dodd, on former appeal).

In the suit so brought by the respondent on such contract, the answer of the Buckinghams (alleging payment of respondent's claim in full for services to the dissolution of the firm on June 9th, 1874,) raised the real and vital issue in the case, and this defence so raised resulted in the finding of the Court that nothing whatever was due respondent either on the alleged contract sued upon or any contract whatever.

This defence of payment was a proper answer and defence to respondent's bill for an accounting.

Brown *v.* Van Dyke, 8 N. J. Eq., 795.
Lockwood *v.* Thorn, 11 N. Y., 170 (1st Kernan), 175.
Tolland *v.* Sprague, 12 Peters, 300-335.
Driggs *v.* Granton, 25 N. J. Eq., 178.
Weed *v.* Small, 7 Paige, 573.
Story's Equity Pleading, § 798.

The bill having been dismissed on the merits of the case, such dismissal is a complete and perfect bar to any action by respondent for alleged services.

In Freeman on Judgments the author states the effect of a dismissal of a bill in chancery as follows:

The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final conclusion on the merits, whether they were or were not heard and determined, unless the contrary appears on the face of the pleadings, or in the decree of the Court.

Citing Smith's Leading Cases, Vol. 2, 167.
(The Dutchess of Kingston Case. 1).
Neafie *v.* Neafie, 7th Johnson's Ch., 1.
Willcox *v.* Badger, 6th Ohio, 406.
Taylor *v.* Yarborough, 13th Grattan, 183.

Scully *v.* C. B. & Q. R. Co., 46 Ia., 528.
Perrine *v.* Dun, 4th Johnson's Ch., 140.
Adams *v.* Cameron, 40th Mich., 506.
Cochran *v.* Cooper, 2 Del. Ch., 27.
Thompson *v.* Clay, 1st Bland Ch., 206.
People *v.* Smith, 51st Barbour, N. Y., 360.
Osburgh *v.* Lafarge, 2 N. Y., 113.
Holmes *v.* Remsen, 7th Johnson's Ch., 286.
1st Vernon, 310.
1st Brown P. C., 281.
Burhens *v.* Van Zeuld, 7 N. Y., 523.

But, independent of the question of estoppel on account of a former adjudication, the respondent cannot recover from the partnership estate any sums for alleged services rendered, for the reason that within two weeks after the dissolution of the firm an account was stated between respondent and Ludlum, the surviving partner, and all sums due respondent for services for the whole period of time preceding the dissolution of the firm was fully settled for and paid in full at that time. This leads to

Point III.

The respondent and Ludlum (the surviving partner) having soon after the dissolution of the firm stated, settled, and balanced their accounts, and Ludlum having paid to the respondent the large balance found due him, the respondent is barred from bringing any action against the late firm for any cause of action arising prior to that settlement.

The payment in full is shown by the uncontradicted evidence of Wright, a witness called by

respondent to explain his accounts on the books of the firm ; also by the accounts so explained.

The account of respondent with the firm had never been settled or balanced from 1864, and at the dissolution of the firm was still open and unsettled.

Mr. Horner died on June 9, 1874. On June 17th respondent was credited with $15,000 for five years' salary to July 1st, 1874, and from the last named date down to the time the account was balanced respondent and Ludlum were actively engaged in settling their respective accounts, and large sums were paid, had and received and debited and credited by both parties respectively, until June 23, when the account was closed, settled and balanced, and respondent received upwards of $12,000 of Mr. Ludlum, being the amount found due him (see Wright's testimony—a witness called by respondent—from page 47 to 61 inclusive, of case).

The Court is referred to all of Wright's testimony to show that respondent took an active part in the settlement of his accounts with the surviving partner of the late firm.

The particular evidence of Wright showing the culmination of this settlement is on page 58, and 59 of case, and is as follows:

"Q. I will read the entry, J. W. McElroy, bills "receivable for note of Union Car Spring Co., four "months, June 2d, paid him, $10,337.35 ; does that "appear under date of June 23d on the other side "of the ledger account? A. Page 161; it does.

"Q. Do I understand you that this last item of "$10,337.35 is entered on the ledger as having been "paid to McElroy on that date? A. Yes, sir.

"Q. What does the interest $138.85 on the other "side of the account mean?

"A. It means the interest up to the date when "he received this note to the time it became "due.

"By Mr. Emery:

"Q. It is a rebate of interest then?
"A. Yes, sir.

"*Further cross:*

"Q. He then receives more than is necessary in "order to balance the account, and so he refunds or "is supposed to refund $188.85, which is charged "on the other side of the account?
"A. He gets a credit of that.
"Q. I mean it is credited on the other side of the account?
"A. Yes, sir; because he don't get the note in "cash until it comes due.
"The Witness: I will explain the two entries in "this way, that the $188.85 is for three months and "four days interest from July 1st until the time it "becomes due until October 5th, when the note be-"comes due, and he is charged with the whole of "the note and credited with that interest, until the "time it becomes due.
"Q. Now what does this item of cash under "date of June 22, $7,031.03, mean, the credit "item?
"A. It is cash paid the company.
"Q. Do you mean that?
"A. Yes, sir; on this date he was paid $7,031.03 on a check.
"Q. What date?
"A. June 17th.
"Q. That appears on the debit side of the ac-"count?
"A. Yes, sir.
"Q. Well?
"A. June 23; he returns that same check and he "gets this note in exchange, and that with the in-"terest balances the account.

"By Mr. Emery:

"Q. Together with the other item for the pur-
"chase of the patent?

"A. Yes, sir.

"*Further cross:*

"Q. Now what does he receive on the 23d of
"June, 1874?

"A. He receives $10,337.35.

"Q. The Union Car Spring Co.'s note?

"A. Yes, sir; and cash $2,600.75.

"*Q. And upon his receipt of that you balanced*
"*the account?*

"*A. Yes, sir.*

"By Mr. Emery:

"Q. On his turning over the $7,000 check?

"A. Yes, sir; that is, it is credited."

See Exhibit No. 2 for defendant. Also

Copy of page 161 of Ledger No. 5 of J. Horner & Co.

This shows not only a stated account in which the respondent took an active part, receiving payment in full, but in fact shows a settled account between him and the late firm of J. Horner & Co., in which he received $12,938.10 from Ludlum, the surviving partner, the exact sum found due him, upon which the account was balanced.

In Lockwood *v.* Thorn, 1st Kernan, 11th N. Y., 170,

"Held whether on a given state of facts the
"transaction constitutes a stated account is a ques-
"tion of law."

And it was further held "that the plaintiff re-
"ceiving and accepting the exact amount found
"due on the stated account was conclusive evidence
"of the correctness of the accounts."

In Tolland *v.* Sprague, 12th Peters, 300-335, Justice Barbour, in giving the opinion of the Court, says:

"We agree that the mere rendering of an ac-"count does not make it a stated one, *but if the* "*other party receives the account, admits the cor-*"*rectness of the items, claims the balance or offers* "*to pay it, as it may be in his favor or against* "*him, then it becomes a stated account, the plain-*"*tiff having received it having made no complaint* "*as to the items of the balance, but, on the con-*"*trary, having claimed that balance*, thereby "adopted it and by his own act treated it as a stated account."

In Brown *v.* Vandyke, 8th N. J. Equity (4th Halstead) 135, the Court says:

"A settled account will be conclusive between "the parties unless some fraud, mistake or omis-"sion or inaccuracy be shown."

See also, Dutcher *v.* Porter, 63 Barbour, 15-19.
Lake *v.* Tyson, 6th N. Y., 461.
Treadwell's Executors *v.* Abrahams, 15 Howard P. R., 219. 5 Denio, 304. 2 Selden, 461.
Styles *v.* Brown et al., 1, (Gill) Md., 350.
See Story's Equity, sec. 526. 523, 527.

The respondent having taken this large amount of money, in settlement of all his accounts with the partnership estate of J. Horner & Co., he is barred from bringing any action at law or in Equity for any cause accruing prior to this settlement of June 23, 1874, without first returning the money so received to the estate and having the settlement set aside for some fraud, error, or mistake.

And it may be remarked here, that from the time of this settlement, nearly ten year ago, no complaint of its unfairness has ever been made by the respondent, or Ludlum in any pleading, or in any other way. The respondent had and received this large sum of money, and has retained it ever since, and it will be shown in a subsequent point

that by this settlement he received one thousand dollars per year from July 1st, 1869, to June 9th, 1874, or $5,000 in all, more than he was entitled to, under a valid and existing contract for $2,000 per year, under which these services were performed.

The heirs of the deceased partner acquiesced in this settlement under the advice of counsel, as it would require an extra litigation to set it aside, which could only be done upon bill and answer.

It is respectfully submitted that all the parties are bound by that settlement, and that it forecloses and bars any and all claims between respondent and the partnership estate prior to June 23d, 1874.

See sections 798, 799, and 800, of Story's Equity Pleadings and cases cited; also sections 523 to 527 inclusive, of Story's Equity Jurisprudence and cases cited.
Driggs *v.* Granton, *Supra.*
Brown *v.* Vandyke, *Supra.*
Weed *v.* Small, 7th Paige, 573.
Lockwood *v.* Thorn, *Supra.*
Tolland *v.* Sprague, *Supra.*

It is submitted further that this settlement of the respondent's accounts on the books of the firm on June 23d, 1874, as appears by Exhibit No. 2, copy of page 161 of Ledger No. 5, (see page 162 of case), was a final end of all his claims against the firm of J. Horner & Co. up to that date. And that the facts appearing in evidence connected with this transaction, both before and after the settlement, constitute a settled account, under the decisions, supra.

And it may be also suggested that if this claim of a settled account and final settlement of all of respondents accounts with the firm had never been heard of before by the respondent or brought to his notice, it was so done in the former action in the most formal manner by the answer of the Buckinghams. (See point 2, *supra.*) It was pleaded

in due form, and in such a way that he was bound to notice it in that suit; and, he having failed in that action to repudiate it or show some fraud, error or mistake or reason why such settlement should not be binding on him, he was barred by the decision in that action from ever contesting it.

And whether he was or not barred by the decision in that suit, the question still remains that the answer of the Buckinghams in that action was a standing notice to him that this settlement was acquiesced in by them, and that it was binding on him as a settled account stated; and that this notice, with the fact of the payment to him of the exact balance found due and his retention of the same for ten years, was such an acquiescence in the claim which, under the decisions cited *supra*, would constitute an estoppel to any action founded on any case that occurred prior to such settlement.

Thus far we have endeavored to show that the defenses of *resadjudicata* and *payment* were good defenses, and that, under the former, the respondent was estopped from relitigating his alleged claim for services, and that, under the latter defense, it was positively shown that nothing whatever was due respondent. If now it should be held that neither of the defenses interposed were tenable, and it should be found that the Court below had jurisdiction to determine the rights of respondent on his common law claim for services rendered to the firm of Horner & Co., then it is submmitted, that inasmuch as such a hearing was practically one *de novo*, the defense interposed that the claim of respondent was barred by the Statute of Limitations was a good and valid defence, and it was error to exclude it.

Point IV.

The Respondent's claim against the late firm, if any he has, cannot be enforced, because the same is barred by the Statute of Limitations.

Any claim that respondent may have had in his favor against the partnership estate, accrued, and was payable to him June 9, 1874, the date of the firm's dissolution. It is a well settled rule of law that the statute begins to run from the time the cause of action accrued.

See Revised Statutes of N. J., page 594, and cases cited.

In Wood on Limitations of actions, § 210, it is said: "If at the date of the dissolution there are debts due or from the firm, the partnership liability continues until such matters are liquidated, or until they are barred by the statute" * * * * "upon the death of a partner, the firm is *ipso facto*, dissolved, and the statute begins to run for and against the personal representatives at once."

See also Wiseman *v.* Smith, 6th Jones, Eq. (N. C.), 124.
Knox *v.* Gye, L. R., 5 House of Lords, 674.
Tatam *v.* Williams, 3 Hare, 349.

Again, it is a well settled rule of law that when the statute has once commenced to run in any case, it will not cease to do so by reason of any subsequent event.

Wood on Limitation of Actions, page 7.

In August, 1874, a bill was filed in equity for a settlement of the partnership estate, and for the appointment of a Receiver. A Receiver was appointed in November, 1874. The appointment of such Re-

ceiver did not suspend the operation of the statute.

Harrison *v.* Duignan, 2 Drury and Warren, 301.

The respondent commenced an action against Ludlum as surviving partner on September 10, 1880, and recovered a judgment in such action for $21,300. At the time such action was commenced the appellant herein was the Receiver of the partnership estate, and could have been proceeded against at law by proper application to the Court. Ludlum, however, whom the respondent elected to sue, did not plead the statute, though six years and three months had elapsed since the action accrued, he could not, therefore, avail himself of its benefit. The statute of limitations must be pleaded.

Brand *v.* Longstreet, 1 South., 325.

The respondent filed his petition to have this judgment paid in June, 1881. On this petition the Court below rendered judgment in respondent's favor on *quantum meruit. The petition must, therefore, be considered as if an action had been commenced by bill, as the relief under the petition proper was refused.* This brings the time from the accruing of the claim on June 9, 1874, to June 9, 1881, the commencement of this action by the petition, to seven years. The statute was properly pleaded against this claim by appellant. No reply was filed thereto to show that the respondent came within the saving clause of the statute, nor was any amendment made to the petition; there was, therefore, no issue on this point, and the answer must be deemed to be true.

Gaskell *v.* Sine, 2 Beasley, 130.
Flagg *v.* Vandren, 2 Stockton, 82.
McLane *v.* Shepherd, 6 C. E. Green, 76.
Brown *v.* Van Dyke, 4 Halstead, 795-802.

The learned Vice-Chancellor in rendering his opinion, held that the statute of limitations did not

apply to the case at bar for the reason *that the assets of the estate was in the hands of a Receiver, and that a trust was created for the benefit of the creditors, and that their debts were relieved from the operation of the statute.* (See opinion, page 190, 192 and 193.)

It is submitted that such a finding was error.

If the decision of the Court below in that regard is correct, all legal claims against a partnership would immediately, upon the appointment of a Receiver, be turned into equitable claims, and demands no matter how ancient or stale against it, could at any time be presented and enforced.

If the respondent is a creditor of the late firm for unpaid services rendered to it, his claim is purely a legal one, and could be enforced in a court of law.

While the Statute of Limitations may have no application to a technical and continuing trust which is subject to inquiry in a Court of Equity only, and the question arises between the trustee and *cestui que trust*, yet it does apply to a trust in respect to which there is a remedy at law.

> The Governor *v.* Woodsworth, 63 Ill., 254
> Paff *v.* Kinney, 1 Bradford, (N. Y.), and cases cited.

So it has been held that a trust raised merely by implication of law, is within the operation of the statute.

> McLane *v.* Shepherd, 21 N. E. Eq., 96.

So in cases of concurrent jurisdiction, such as matters of account, etc., where the parties may proceed either at law or in equity, the Statute of Limitations applies with equal force in both Courts.

> Teach *v.* Gilson, 8th Md., 70.
> Crocker *v.* Clements, 23 Ala., 296.
> Pratt *v.* Northam, 5 Mass., 95.
> Bailey *v.* Carter, 7 Iredell Eq. (N. C.), 282.
> Robinson *v.* Hook, supra (p. 152).

In such cases Courts of Equity do not act so much in analogy to the statutes as in obedience to them.

Hovenden *v.* Annesley, 2 Scholes & L., 607–629.
Willhelm *v.* Caylor, 32 Md., 151.
Ayer *v.* Stewart, 14 Minn., 97.
Dodge *v.* Lenox Ins. Co., 12 Gray, 65.
Longworth *v.* Hunt, 11 Ohio St., 194–201.
2 Story's Eq., § 1520.
Carrol *v.* Green, 92 U. S., 509.

"The rule is that the statute attaches *proprio vigore* to any legal claim, and follows it wherever it goes into Equity for a peculiar equitable remedy. And the Court applies the bar not by analogy, but in obedience to the statute." "The test is not whether the remedy is legal or equitable, but whether the claim is legal or equitable, and if the latter equity follows the law as to limitation."

Field *v.* Wilson, 6 B. Monroe, (Ky.) 479, 481.
McCrea *v.* Purman, 16 Wendell, 476.
Humbert *v.* Trinity Church, 24 Wendell, 605 to 608.
Green *v.* Johnson, 3 G. & J. 389.
Dugan *v.* Gettings, 3 Gill, 161.
Kaine *v.* Bloodgood, supra.

But we submit that there was not in this case even a constructive trust in favor of respondent, inasmuch as his claim was not presented to the Receiver for payment until it had already been barred by the statute.

The claim was presented on July 26, 1880 (see case, p. 3), and on June 9, 1880, the same was already barred. Before it was presented no one ever heard that such a claim ever existed against the firm, and when the Receiver wrote to Ludlum asking him to transfer the property over to him, Lud-

lum, on July 23, 1880, refused to do so, until he had consulted his attorney, inasmuch as he desired to see respondent first paid (see his letter on p. 164, Ex. 4).

It is submitted that this letter shows that neither Ludlum or respondent had ever thought of his claim up to that time.

If the respondent had brought an action at law in the proper form, and had made the proper parties defendants to the same, the defense of the statute would have been interposed by the defendants, and the Court would have been bound to allow it. The same rule under the cases *supra* follows the claim into equity, and the rules of the former forum should have been applied.

> Hovenden *v.* Lord Annsley, 2 Schoales & L., 630 (Star., p. 631.)

But independent of the defenses set up, all of which it is submitted, however, were good, and either one of which was sufficient to prevent any recovery by the respondent, the evidence taken on the trial, and which fairly preponderated in favor of the estate as represented by appellant, did not warrant the Court to find that the respondent was entitled to recover any sum over and above the salary paid him, as it was shown that he was paid all that his services were reasonably worth to this late firm during his employment. These facts will be pointed out in the next point.

Point V.

This point is founded on the theory of the learned Court below, that this matter was an open question to be tried before him on the merits.

If this is correct, then the parties having once litigated this matter on an alleged contract, and that contract having been by the Court of Chancery and this Court declared to have never been made, then it follows that the parties are remitted to their rights under the only valid contract which was ever made in relation to these services, and while it stands on the books and has been acted upon and was never altered or changed during the lifetime of the firm, it must govern this matter, and no action on *quantum meruit* can be maintained while this contract still remains in force.

This contract appears on the books of the firm, and from the evidence of Wright, a witness called by respondent given on the trial of this petition, (see his testimony on this particular point from pages 55 to 60 of case inclusive), it appears that on the 1st day of July, 1869, at the time the alleged contract was made which was the subject of a former litigation, there was a valid existing contract in existence, under which McElroy performed the services in question for $2,000 per year, which had been acted upon for years (see also testimony of petitioner on page 25 of case), and which it appears had not been altered or changed during the existence of the

firm; and it was held by the Court of Chancery on the former trial that after the dissolution of the firm, it was not competent for the surviving partner to make any new contract or promise to bind the estate. See opinion of V. C. Dodd in the former trial. And see McElroy *v.* Ludlum, 5th Stewart, N. J. E., 828. See Disbrough *v.* Bidleman's Heirs, 1st Zab., 677.

Bell *v.* Morrison, 1st Peters, 351.

In the case of The Grover & Baker Sewing Machine Co. *vs.* Aristarcus Bulkley, 48 Ills., 189, it was held:

"1st.—Contract of employment, fixing time and "price, party holding over term, adopts the origi- "nal contract as to price paid. Where a party en- "ters the employment of another under a special "contract, fixing time and price to be paid for his "services, and continues in such employment after "his term has ended, he will be considered as hold- "ing under the original contract."

2d.—"And in such case the contract will control "the price, and it is error for the Court in its in- "struction to the jury, to put the claim for such "service performed after the expiration of the term "upon the basis of a *quantum meruit.*"

Citing McKinney *v.* Peek, 28 Ills., 174.
Derpend *v.* Wulbridge, 15 N. Y., 374.

In Car *v.* Chartiers Coal Company, 25 Pa. State, 337, it was held that "a person employed to perform "certain duties at a fixed rate of compensation, "cannot demand extra pay for increased services "in that capacity, which were not anticipated at "the time of hiring; his salary is deemed to cover "all services required of him, in the particular em- "ployment in which he was engaged."

In the case at bar, the respondent was hired as an ordinary workman until September, 1866; then for a year as superintendent (see his testimony on page

25 of case) at a salary of $1,500; then at a salary of $2,000 per year. At the time his salary was increased to $2,000 per year the firm was doing a large business, which was not much increased during the existence of the firm, and it was the salary agreed upon between the parties, and a liberal one. It has been held that "it is an established rule that "an implied contract cannot arise where there is a "subsisting express contract, covering the entire "subject matter." See:

Galloway *v.* Holmes, 1 Doug., Mich., 330.
Ford *v.* McVay, 55 Ills., 119.
Smith *v.* Bowler, 1st Dinsey, Ohio, 520.

A contract in writing is presumed to embrace all that the parties intended; and unless there is a latent ambiguity, parole evidence is not admissible to alter, vary or explain it. See—

Kemp *v.* Rose, 1 Giff., 258.
Evans *v.* Roe, L. R., 7 C. P., 138.
S. C., 2 Eng. R., 116.

This rule is applicable to contracts for work and service, and in an action upon a written contract that the plaintiff should serve the defendant at a certain annual salary, the plaintiff was not permitted to show that it was agreed that the salary should be paid quarterly, nor would the Court infer such agreement from the fact that it had been so paid.

See Giraud *v.* Richmond, 2d C. B., 835.

And in the case of an express contract, there can be no recovery except upon the contract, unless there has been a rescission of it.

These cases are cited to show that neither respondent nor Ludlum could alter this contract by parole evidence or by entries on the books after the dissolution of the firm, and that for the services rendered by respondent as superintendent of the steel works no recovery could be had except upon that contract.

No implied promise to pay any more than $2,000 per year for respondent's services during the five years from July 1st, 1869, to July 1st, 1874, can arise because of the increase in the business of the firm during that time ; if the sevices was increased during that time they were scuh as he was bound to render under his contract.

This question was fully discussed in Ross *v.* Hardin, 79 N. Y., 84.

The head note states the proposition, and the decision applies directly to the respondent's claim for extra services claimed to have been rendered J. Horner & Co. while working under this contract, and is as follows :

"The rule of law that from a request to perform "services an implied promise arises to pay what "the services are worth does not apply where the "services are rendered by one in the employ of the "person making the request; in such case the im- "plication is that the services were rendered under "the contract of employment, particularly if the "services are of the same character as those em- "braced in the contract.'

And this doctrine was recognized in the decision and opinion of the Court of Chancery on the former trial, where it was contended by the learned counsel for respondent that if the alleged contract there sued on could not be carried out owing to the state of the accounts, which rendered it impossible to ascertain the profits, or was void under the statute of frauds, or was never made, yet, as it had been performed by respondent, on his part he was entitled to recover under it the value of the services rendered. The Court, in answer to this proposition, in its opinion, says :

"The acts relied on as part performance in the "present case are the services rendered by the com- "plainant, but how can they be referrable ex- "clusively to a contract, for one-eighth of the "profits, instead of compensation by salary? How

"are his services from July 1st, 1869, referrable to "such a contract any more than during the years "prior to this date, when he also received a "salary." See opinion of V. C. Dodd, on former trial.

The attention of the Court in this connection is again called to the peculiar way in which this decree in favor of respondent is reached.

The only persons damaged by it are the heirs of the deceased partner, Mr. Horner.

By the fraudulent action of respondent and Ludlum they were deprived of all opportunity of defense in the proceeding in the Supreme Court, either in person or by their representative, the Receiver.

Had the Receiver or the heirs of Mr. Horner been made parties they had at least four valid defenses to wit, former adjudication, payment, the statute of limitations, and a settled account, and they could have counter claimed for the $5,000 over paid the respondent, and if the first four defenses had been ruled out the effect would have been that the last must, under the facts, have prevailed beyond all controversy, and the respondent would have had to pay back that $5,000 with interest.

Now, the respondent brings his petition to the Court of Chancery founded on this fraudulent judgment, and asks that the Receiver pay it out of the assets of the estate. The Receiver can do no less than to answer, and, out of abundant caution, set up the defenses that appear in his answer. He could not counter claim by cross petition as no such proceeding was ever heard of. The heirs of Horner were not made parties to the petition, and if they had been they could not have counter-claimed by cross-petition; and, by these means, they were, by the fraud of Ludlum and respondent, deprived of any defence in the Supreme Court.

Point VI.

This point is also founded on the theory of the learned Court below, that this was an open question to be tried before him on the merits. If his theory is correct and this was the only question before him, then it is submitted that the evidence shows that the claim possesses no merits, and that the payment to him for his services, at the rate of three thousand dollars per year, is and was liberal pay.

The witnesses for the respondent on this question were Ludlum, Mr. Thompson and the respondent himself. Ludlum, who was the organizer of this scheme (see his letter to Kirkpatrick, Receiver's Exhibit No. 4, page 164), was called as a witness for respondent. This letter shows that at that time he had never thought of this claim.

Up to this time respondent and Ludlum had been engaged in an effort to fasten an unlawful claim on this partnership estate founded on a pretended contract. (See the pleadings Exhibit No. 12, from pages 169 to 182 of case.)

The proceeding in the Supreme Court of September, 1880, was the result of collusion between respondent and Ludlum, and was continued and carried on by Ludlum to defraud the heirs of Mr. Horner. (See correspondence between counsel of the executrix of Mr. Horner and Ludlum and Lawrence, his counsel, from pages 166 to 168 of case; see, also, evidence of Ryerson as to Ludlum's intentions, on pages 121 and 122 of case).

This correspondence shows beyond all controversy that Ludlum and respondent were in collusion to defraud the estate.

If the respondent had been honest in his pretended claim, he would have made the Receiver and the executrix of Mr. Horner parties to the suit in the Supreme Court. In view of these facts, it is submitted that their evidence as to the value of respondent's services, as given on the trial of this petition, should be disregarded altogether, and after having by their fraud deprived the heirs of Horner of any defence to this claim, they should not be allowed to fix the amount of their reward, viz.: the value of respondent's services on *quantum meruit*, by their own testimony.

Mr. Thompson thinks respondent's services were worth $5,000 per year. (See his direct testimony on page 133 of case).

On cross-examination it appears that Mr. Thompson paid his Superintendent only $5,000 per year. (See case, page 149). He had been a Superintendent 15 years previous in Pittsburgh.

And it further appears that Mr. Thompson's works turned out from twenty to thirty tons of finished steel per day. (See Thompson's evidence, page 135 of case).

It may be remarked in this connection that J. Horner's & Co's works turned out only from 5 to 7 tons of finished steel per day. (See Ludlum's testimony on page 91 of case).

So that he thinks respondent ought to get as much as his own superintendent, who does at least four times the work that respondent was called upon to do, and has four times the care and responsibility.

In order to increase the value of respondent's services from July 1st, 1869, to June 9th, 1874, much stress is laid on the fact that respondent knew how to use a patent which he had sold the firm, and on that account his services were worth more. The evidence shows that respondent brought this patent with him to Pompton in 1864, and in May and June of that year it was in full working order. Horner & Co. bought this patent for $22,500; respondent had owned

one-third of it, and showed the firm how to use it, and their successful use of it induced them to buy the patent, in 1865 at the large price above named, and respondent's connection with it ceased thereafter. See his testimony on pages 26, 27 of case.

This testimony is referred to to show that this patent had nothing to do with the services of respondent after July, 1869, any more than before, for it had been in full use, for five years previous thereto.

Having shown what the testimony of the respondent to sustain his claim on *quantum meruit* was, it was shown by appellant in defense by the uncontradicted testimony of respondent that the patent was a success in 1864, and the firm had been shown how to use it, and that it had been sold to the firm in 1865 (see pages 26 to 27 of case), and was in full use after that time, so that no claim could be made that the value of the services should be increased on account of that patent. Also that after 1866 respondent thought $1,500 was fair pay for his services as superintendent, and that up to 1869 he considered $2,000 per year fair pay, (see testimony on page 25), and that from 1867 to 1869 the firm had all they could do. And it appears that for two years prior to 1869 or at least one year, the firm were doing as large a business as it ever did.

There was no increase in the business after 1869, and no extra care or work required of respondent after that time, on account of the patent or anything else. Why his services should be worth more after July 1st, 1869 than before, has not been shown. (See respondent's evidence on page 29 of case). This evidence is referred to to show that both respondent and Ludlum's opinion in 1869 was that the services of respondent, as Superintendent, were worth only $2,000 per year, and that he was amply compensated in the receipt of that sum. The books of the firm, and Wright's testimony, explanatory of the entries (pages 55 and 56,) showing the salary list including respondent's of nearly fifteen years

ago, is certainly the best evidence that could possibly be introduced on the question of the value of respondent's salary at that time, and to permit the record to be impeached now by the evidence of Ludlum and the respondent, is contrary to all principles of law; what the record shows is more potent than the evidence of Ludlum who is, and has always manifested an eagerness and zeal to pay all sums from the Treasury of the estate, at the expense of the representative of his deceased partner. If the respondent worked constantly to 1869, at a salary fixed by the firm before its dissolution, and that salary appears on its books to have been paid and accepted without protest, it is strange indeed, to say the least, that when the lips of one of the members of the firm is sealed in death, this alleged new contract is suddenly sprung on the estate. But the book entries, which absolutely impeach the testimony both of the respondent and Ludlum, and which cannot be varied by parol are and must be considered as final and conclusive and superior to the evidence of the parties, which is given fifteen years after such entries were made. These are hard facts and show conclusively that respondent and Ludlum were both satisfied.

Henry J. Hopper, a witness also called for appellant, a steel maker of large experience, and a disinterested witness, swears that his services were fairly worth $3,000 per year. (See his testimony on page 39 of case, and his whole testimony).

Robert Jennings, a disinterested witness, called by the appellant, also testifies that respondent "would be fairly and reasonably well paid for his "services if he received a salary of two thousand "dollars to twenty-five hundred dollars per year." (See page 156 of case).

It is respectfully submitted that respondent was fairly and liberally paid for the services rendered, and that this is established by a great preponder-

ance of evidence on the part of the estate, and that he has been fully paid for all the services he ever rendered to the firm.

VII.

The decree of the Court below should be reversed and the petition dismissed.

FREDERICK W. STEVENS,
Solicitor for Appellant.

J. M. BUCKINGHAM and
WILLIAM JAY,
of Counsel.

APPENDIX.

IN CHANCERY OF NEW JERSEY.

JOSEPH W. MCELROY, *vs.* JAMES LUDLUM, ALICE BUCKINGHAM, et al.	Opinion.

Argued upon pleadings and proofs.

Mr. EMERY for complainant.

Mr. KEASBEY, for the defendant, Alice Buckingham.

THE MASTER:

This suit is for an account and the recovery of a share of partnership profits alleged to be due the complainant, not as a partner, but by way of compensation for services in the business of the firm.

The complainant, Joseph W. McElroy, was the superintendent of the steel works belonging to the late firm of James Horner & Co. This firm, composed of James Horner and James Ludlum, after carrying on for twenty years a large manufacturing business, of which their steel works were a part, was dissolved by the death of the senior member, James Horner, on the 9th of June, 1874. Mr. Horner resided in his lifetime in the city of New York. Mr. Ludlum resided on the property of the firm in Pompton. The property included about five

hundred acres of land at that place, a large water power, factories in which the manufacture of different products was conducted, dwelling houses, machinery and personal property of various descriptions. By the will of Horner, his estate was given to his daughter, Alice Buckingham, wife of John M. Buckingham, in part to her own use and in part in trust for his other daughter. Soon after his death differences arose between his representatives and the surviving partner, and in August, 1874, a bill was filed in this Court by his executrix, Alice Buckingham, against Ludlum, for the appointment of a receiver and the settlement of the partnership affairs. By an order of the Chancellor, on my advice, Ludlum was appointed receiver on the 17th of November, 1874. The prevention of protracted litigation between the parties, which was contemplated in this appointment, has not been effected. The antagonistic and embittered relations existing between them is partially disclosed by the pleadings and proofs in this suit, and give to it some peculiar and unusual features.

The bill alleges that the firm of Horner & Co., on or about the 1st of July, 1869, at Pompton, agreed with the complainant to pay him, as compensation for his superintendence of the steel works, one-eighth of the profits of the business of the steel works during the time he should be the superintendent after said day, and did also guarantee to him that the one-eighth of said profits should not be less than three thousand dollars in each year thereafter. That by the arrangement then made he was sure of receiving from said firm, during the period of his superintendence, three thousand dollars in each year, and such proportion of the one-eighth of said profits as should appear to be annually made out of said business.

The defendants in the bill are Ludlum and wife, Alice Buckingham, and John M., her husband, and Susan Horner, the *cestui que trust* in the will of

her father. The several answer of Ludlum admits the making of the agreement set up in the bill. The answer of Alice Buckingham and her husband denies the making of the agreement, and charges that McElroy and Ludlum have combined to establish an unfounded claim against the estate to absorb and dispose of the entire property that remains.

The bill was filed in January, 1877. Testimony was taken before an Examiner, and a hearing had before me as Advisory Master in the following November. Being of opinion that the cause as it stood ought not to be finally and conclusively disposed of upon the points then presented by it, but that further proofs should be taken as well to such points as to the requisite materials for an account, and the ascertainment of how much, if anything, was due to the complainant, upon the agreement set up in the bill; the suit was further held for that purpose. The additional testimony and exhibits were subsequently produced, the cause argued upon all the questions raised by the pleadings and proofs, and a final decree advised by me dismissing the bill. The conclusion was arrived at not without hesitation, in view of the testimony of Ludlum, who was called by the complainant, and favorable to his claim, but with a strong conviction in the end, after the best consideration I have been able to give, that it was the only conclusion I could legally or equitably reach.

The alleged agreement was a verbal one. No note or memorandum of its terms, or of the fact of an agreement, was made when it was entered into, or at any time afterwards during the lifetime of Horner. At his death there was nothing in the books or accounts of the firm to suggest it. These books and accounts had been poorly and imperfectly kept. No settlements had ever been made between the partners. The separate branches of their business had not been discriminated, but were blended to-

gether in the accounts. Inventories of property or stock were not made, except the partial one of July 1, 1869, which was a list of articles connected with the steel works, but without prices or value. A steel works account was begun July 1, 1869, but as it stands in the books is partial and incomplete. From July 1, 1869, till Horner's death in June, 1874, no yearly settlements were made; no inventories taken, and no balances to show whether profits or losses were the yearly results of the business. Whether profits resulted to the steel works, and if so, how much in each year during the five years from July 1, 1869, is a question incapable of solution without sifting the accounts contained in the books and supplying their defects by estimates and allowances, which can give at best but approximate and unsatisfactory results. On what views profits should be reckoned, or, in other words, how far interest on capital, interest on indebtedness, rents, taxes, wear and tear of machinery, buildings, &c., should be considered, or was meant to be considered by the partners, or would be necessary now to be taken into the account in any attempt to assign the profits of the steel works alone, I think it would be far from easy to say. I think from the examination I have made of the books that any estimate of profits would for these reasons be open to very great doubts. Looking at the state of the partnership books and affairs as they stood on the 1st day of July, 1869, and also as they subsequently continued to be, it is difficult to think that an agreement for a share of the profits of the steel works so definite and complete as to be capable of judicial enforcement was then made or thought necessary to be made by the parties. A general understanding, dependent on particular terms and adjustments, thereafter to be agreed on in an amicable settlement between them, is more compatible with the conduct of the parties, and I think also with the other proofs in the cause.

When the firm was dissolved, its assets, real and personal, were supposed to be large, over and above its indebtedness. By the shrinkage of values, by the sale under foreclosure of the real estate, and the sale at a sacrifice of the personal, the firm assets have since been disastrously reduced. Whatever the profits of the steel works may be thought to have been as of July 1, 1869, on calculations and valuations relating back to that date, they are not represented by existing available assets. So that if the amount of profits exceeding twenty thousand dollars, which the complainants now seek to recover, in addition to the fifteen thousand he has received, should be allowed him, it would more than absorb the available assets now left of the partnership estate. The large indebtedness adjudged to be due from Ludlum to the firm would, as far as now appears, leave this available remnant distributable to the estate of the deceased partner, Horner.

The complainant was employed by the firm first as a puddler in the steel works, receiving wages as a workman till September, 1866, then for a year at a salary of $1,500, then till July, 1869, at a salary of $2,000 a year. For the five years following the last date he received $3,000 per year. This annual salary, Mr. Ludlum says, was meant to insure the complainant against loss. His claim for larger compensation does not seem to have been present to the mind of Mr. Ludlum when first stating the liabilities of the firm after dissolution. The uncertainties and dangers attaching to the recollections of witnesses, when the details of transactions long past are derivable solely from memory, are not to be overlooked in dealing with the parol understanding on which the estate of the deceased partner is sought to be charged. I am constrained to say, in view of the relations of the parties peculiar to this case, that an agreement "clear, definite and unequivocal in all its terms," such as the settled

rule of equity requires, has not to my mind been established by the proofs.

But taking the agreement in substance and form, as Mr. Ludlum's best recollection after the lapse of eight years has enabled him to state it, is the agreement one on which this suit against Horner's representatives can be maintained? I am of opinion that it is not. What his best recollection of it was, as first stated in his evidence, appears from the questions and answers on cross-examination as follows:

"Q. How long before July 1, 1866, did you contemplate a new arrangement with Mr. McElroy?

"A. Well, I cannot answer exactly.

"Q. About how long?

"A. I cannot tell exactly; it may have been one month or three months.

"Q. Had you talked it over with him during the preceding week or month?

"A. I had talked it over with him preceding July 1, 1869.

"Q. About how long before the agreement actually did take effect, and when was it that you made the agreement with him?

"A. I cannot answer that, it is so long ago.

"Q. You cannot give an answer, then, that it was before that time?

"A. It might have been four or six weeks.

"Q. It was previous?

"A. Yes, sir.

"Q. You can swear to that?

"A. Yes, sir.

"Q. Who was present when the contract was made?

"A. I don't remember.

"Q. Did you make any written agreement?

"A. No, sir; I never made any written agreement with Mr. McElroy about any agreement with him.

"Q. What were the terms of agreement—the last agreement with Mr. McElroy, made prior to July 1, 1869?

"A. The agreement between Mr. McElroy and the firm of James Horner & Co. was, that from the first day of July, 1869, he should receive as a compensation for his services a salary which should be equivalent to one-eighth of the profits of the business, and to insure him against loss it was agreed and understood that his profits should not amount to less than three thousand dollars per year; he was simply a salaried superintendent, and the amount to be gauged in that manner.

"Q. Now, was that agreement to stand any longer than a year?

"A. Yes, sir; it was to stand continually right along.

"Q. But was it not limited to the first year of his employment?

"A. No, sir; it was not."

If an agreement clear, definite and unequivocal in all its terms, defining the nature and amount of the profits which the complainant was to take, can be regarded as established by the proofs, it must be taken, I think, to have been made prior to July 1, 1869, to go into operation on that day, and calling for yearly services and yearly settlements thereafter. Consequently a contract not to be performed within a year from the time it was made.

It was contended on the argument by the counsel of the complainant that this contract is exempted on two grounds from the operation of the statute of frauds requiring it to be in writing; first, because the making of the contract has been admitted in the answer of Lndlum, the surviving partner; second, because the contract has been partly performed. Neither of these contentions, it seems to me, can prevail. Without suggesting any distinction between the statute of frauds and the statute of limi-

tations, but accepting the settled rules as to the effect of a partner's admission under the latter statute as equally applicable to the former, it is enough to say that in the present case the admissions of Ludlum were made subsequent to the death of Horner, his partner, and do not bind his representatives. The rule elucidated and settled in *Merritt* adsm. *Day*, 9 Vroom, 32, was relied on to give efficacy to Ludlum's admissions. There a payment of interest made by a partner on a note of the firm after its dissolution, and before the note had been due six years, was held to renew it as against the statute of limitations. Both members of the firm were bound by the admission involved in the payment, for the reason that the act of one was the act of both, an agency for each other being implied. But both partners in that case were living. Had one been dead, the admission by payment would have been binding only on the party making it. This is the point of the decision in *Disborough* v. *Bidlemann's heirs*, 1 Zab., 677, where it was held by the Court of Errors and Appeals that payment on a joint and several bond by the surviving obligor after the death of his co-obligor, will not take the case out of the statute as against the heirs of the deceased obligor. The implied agency held to exist between two partners or joint debtors, by virtue of which one can bind the other by admissions, was said by the Court to be revoked by the death of either. When the community of interest between the makers of a joint and several promissory note is severed by the death of one, the representatives of the deceased, it was held, could not be made liable by admissions made after his death by a surviving co-debtor.

Nor do I think that there is any reason for exempting the agreement from the statute because of part performance. Where a parol contract has been partly performed, Courts of equity compel its execution to prevent the commission of a fraud

with impunity. But the acts relied on as part performance must be exclusively referable to the contract. In order to make the acts such as a Court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For if they are acts which might have been done with other views, they will not take the case out of the statute since they cannot properly be said to be done by way of part performance of the agreement. *Story's Eq. Jur.*, section 762; *Wallace* v. *Brown*, 2 Stock 308; *Ackerman* v. *Ackerman*, 9 C. E. G.

The acts relied on as part performance in the present case are the services rendered by the complainant. But how can they be referable exclusively to a contract for one-eighth of the profits instead of a compensation by salary? How are his services from July 1, 1869, referable to such a contract any more than during the years prior to this date when he also received salary? In *Cooper* v. *Carlisle*, 2 C. E. G., 525, it was said by the Court of Appeals, commenting on the painful uncertainty of parol evidence to establish agreements years after the time when alleged to have been made, that Courts are disposed to enforce the statute as wise and salutary in its effects. Its effect, I think, will be right in this case.

Decree advised dismissing the bill, but without costs.

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

N. J. Court of Errors and Appeals.

Between
ANDREW KIRKPATRICK, *Receiver, Appellant,*
and
JOSEPH W. McELROY, *Respondent.*

Points.

This was an application to the Chancellor by Joseph W. McElroy, to be paid out of the fund in the appellant's hands held by him as receiver of the late partnership of James Horner & Co., the balance due on a judgment of $21,361.84, recovered by him in the year 1881, against the surviving partner, James Ludlum, the balance being $20,761.84 with interest.

This judgment was recovered (so the allegation is) for services rendered as superintendent of the steel works of James Horner & Co., between July 1, 1869, and June 6, 1874, and represents (as is claimed) not the whole value of such services, but their value after deducting $15,000, admitted to have been paid on account.

The facts are these: McElroy entered the firm's employ in 1864. (p. 25, l. 9.) He was then 40 years old, (p. 13, l. 6,) and had from the time he was 17 years old worked as a puddler in Pittsburg, (p. 34, l. 25.) He worked for the firm of J. Horner & Co., in the same capacity from 1864 to 1866, (p. 25, l. 30,) earning from $5 to $7 per day, (l. 20.) Then he became superintendent of their steel works at a salary of $1,500 a year for the first year, (1866-7,) and $2,000 for the second and third years, (1867-9.)

For similar services rendered from July 1, 1869, to June, 1874, Ludlum, after Horner's death, actually paid him $3,000 per annum, (p. 161-2.) Not satisfied with this, over two years after Horner's death he filed a bill to recover a share of the profits. He was defeated both in the Court of Chancery and in this Court, on the ground, (1st,) that no definite agreement was proved; (2d,) that even if proved it was void, under the statute of Frauds. (5 Stew. 828.)

On July 26, 1880, over six years after Horner's death, McElroy presented to the receiver, Andrew Kirkpatrick, a claim for further compensation founded on a *quantum meruit*. On September 10, 1880, he commenced an action in the Supreme Court against James Ludlum, as surviving partner, to recover such compensation. Ludlum refused to plead the statute of Limitations, (p. 167, Ex. No. 10,) and by collusion (as we insist) permitted judgment to be entered against him for $21,300.06. Owing to Ludlum's insolvency, only $600 was collected on account of this judgment, (p. 4, l. 28,) and in June, 1881, the present proceeding was instituted against the receiver to recover the balance, (p. 5.) The Vice-Chancellor disregarded the amount as ascertained by the judgment, and after trying the case on its merit ordered the receiver to pay to McElroy $5,013.78 with costs, (p. 199, l. 8,) thus allowing him at the rate of $4,000 per annum from July 1, 1869, to July 1, 1874. The receiver appeals from the order, and submits the following points:

Point I.

McElroy is not entitled to recover anything in this proceeding, for the reason that he has already received as much as his services are fairly worth.

His position, after July 1, 1869, was the same as it was before, while in the receipt of $2,000 per annum. As the parties themselves, by voluntary agreement, had fixed that rate of compensation, it must be presumed to have been a fair rate for the work then done, and, as it is con-

ceded that no new valid agreement was ever entered into changing the rate, the petitioner can only recover more, *first*, by showing that the former agreement had come to an end, and *second*, by showing either that the increased business entailed increased labor, and that, therefore, he was justly entitled to further compensation, or that the former rate was manifestly unjust. And not only must he show this, but he must also show that the considerable increase in salary from $2,000 to $3,000, which he actually received from Ludlum, was not large enough.

I. It is respectfully insisted that the increase in the business of the firm, after July 1, 1869, was by no means great enough to entitle him to just double the compensation he was content to receive for the two years prior to that time. He went into J. Horner & Co.'s employ May, 1864. He worked as a puddler for two years, earning from $5 to $7 a day, (p. 25, l. 20); then he became superintendent, receiving for the first year $1,500, and for the next two years $2,000, as before mentioned. This brings us down to July, 1869, when, as he says, the new agreement was made, (p. 14, l. 20–40,) which this Court deemed inoperative. Abandoning this agreement, he necessarily insists that after July 1, 1869, his services were, without special agreement, fairly worth just double what he had been willing to receive prior to that time; that such a contention is without foundation in fact, is apparent from the following considerations:

1. The capacity of the work was not increased after July 1, 1869.

A new workshop was built either in 1865, 1866 or 1867, (p. 30, l. 35; p. 31, l. 4.) According to Ludlum, it was the melting furnaces which increased the capacity of the works, and these were increased from 24 in number to 42 in 1866 or 1867, (p. 41, l. 10.)

2. The quantity of work done did not greatly increase after July 1, 1869.

McElroy says they had all they could do from 1868, (p. 29, l. 30; p. 40, l. 1,) after that there seems to have

been a gradual increase until 1873, when the panic occurred and then a great falling off. (p. 30, l. 12; p. 25, l. 5.)

3. The quantity of finished steel turned out was but little greater subsequent to July 1, 1869, than it was during the year prior thereto.

McElory says that from 1869 to 1874, they turned out from 4½ to 5½ tons a day. (p. 21, l. 8.) Ludlum, always exaggerating, says from 6 to 7, but he thinks it may have been less. (p. 91, l. 10, 17.) McElory says further, that as early as 1866, they turned out about 3½ tons per day. (p. 29, l. 6.) It increased some in 1867, (l. 9) and as the furnaces were increased, not later than 1867, (*ante*) from 24 to 42, and as they had all they could do in 1868 and 1869, it is fair to conclude that the works turned out from 4 to 4½ tons, if not more, during those years, and that the average, though it rose slightly after that time, never exceeded the maximum amount stated by McElroy, viz., 5½ tons.

4. The number of workmen employed points to the same conclusion.

McElroy says that probably two-thirds as many men were employed in 1867 as in 1873, and that they kept gradually increasing their force from the first named year. (p. 30, l. 12 to 20.)

5. McElroy says further, that the work did not change in character after he became superintendent in in 1867, (p. 28, l. 38,) the only difference being that he had more to do. (p. 29, l. 1.)

And he admits that in one respect his labors were lightened, for in the last two years of his employment they gave him a shipping clerk, (p. 33, l. 23,) he, himself, before that time, having performed the duties of that officer. As to his doing night work—that he had always done from the time he first took charge of the works. (p. 34, l. 14.)

Now, is it not clear from the above resumé of the testimony, that there was no such sudden change in the character of McElroy's work as would justify this Court

in saying that while prior to July 1, 1869, his services were worth only $2,000 per annum, immediately thereafter they became worth $4,000? He has been actually paid $3,000 per annum, since July 1, 1869, (p. 9, l. 4,) and so got an additional yearly compensation of $1,000. Surely, no one was better able to fix the value of his services for the two years prior to July, 1869, than McElory himself, and during that time he was willing to work for $2,000 per annum. What better criterion can we have for their value after that time than that sum-- adding to it such additional amount as would, under the evidence, repay him for the additional labor imposed in consequence of an increase of business. If we do this we find that Ludlum, after Horner's death, actually overpaid him. This disposes of the idea, that conceding the compensation received by McElroy in 1868-9, to have been sufficient compensation, he is entitled to double the amount after that date, because of the increase in his labors.

II. The only other alternative for McElroy is that the rate of compensation agreed upon between himself and the firm in 1868-9, affords no fair criterion for the determination of the real value of his services, and that we must have recourse to the opinions of experts in preference.

The difference of opinion among the experts called in this case, shows how unsatisfactory this method of solving the problem is. One of the receiver's experts, Jennings, puts the fair value of McElroy's services at from $2,000 to $2,500, (p. 156, l. 27,) the other, Hopper, at $3,000, (p. 39, l. 20.) On the other hand, the only expert (outside of Ludlum,) called by McElroy, Thompson, puts it at $5,000, (p. 133, l. 39.) He admits that he does so because he attributes to McElroy special and peculiar knowledge of the patent process obtained from Hartman, Brunt & Co., (p. 147, l. 31, *et seq.*) but this notion is without foundation. McElroy parted with all his interest in the patent, for which he received from Horner & Co. $7,000, (p. 26, l. 20,) in 1865, so that he is entitled to no

further compensation on that ground. (p. 27, l. 10–14.) He says that considerable practice was required in order to learn the use of the process—but that he taught it to all the men in two or three years. (p. 21, l. 1; p. 34, l. 15.) He commenced to do so immediately after he began to make steel, (p. 34, l. 20,) that is in 1865, so that all the hands were familiar with it in 1868. To Thompson it seemed quite simple in theory, but he never tried it practically. (p. 150, l. 5, 36.)

Now, if this be so, it follows that McElroy's services were peculiarly valuable to the firm from 1864 to 1867; that is at the very time when he was receiving the smallest compensation, and it was only after his knowledge had been completely imparted to others, and had become their property as well as his, that it began to have the pecuniary value attributed to it! A more extraordinary insistment was never attempted.

It may require genius to invent, but the application of the invention is left to workmen possessed of no more than ordinary skill, who will often, as mere manipulators, excel the inventor. So here, after McElroy had *communicated* his knowledge, others could apply the invention as well as he, and McElroy does not pretend to say that they could not. (p. 21, l. 1.)

Again, Thompson paid his own foreman only $5,000, (p. 140, l. 35,) his duties being similar to those of McElroy, (p. 135, l. 23,) and his works turning out from 20 to 30 tons a day against the 4 or 5 tons turned out by the factory of Horner & Co.

Ludlum, having no present interest in the estate, to which he is indebted over $100,000, and hostile in the last degree to Mrs. Buckingham, (p. 121, l. 35; p. 127, l. 15,) now puts the value of McElroy's services at $500 per month, or $6,000, while in 1868 to 1869 he was only paying him $2,000.

McElroy himself fixes the value of his services at $5,000, (p. 23, l. 9,) but is unable to give a single reason for making this particular charge rather than any other, (p. 101, l. 20.) When a party to a controversy testifies to a

fact, his testimony is viewed with suspicion, but when only to a matter of opinion like this, and when he is unable to fortify that opinion by a single reason, it is worthless. Particular attention is called to this part of the cross-examination, (p. 101,) as indicating the intelligence and calibre of the man.

The whole idea of giving McElroy more than $3,000 was an afterthought. Ludlum did not mention this supposed claim in his sworn answer in the main case, filed in 1874, nor in a letter written to Mrs. Buckingham on July 15, 1874, (p. 163.) He balanced McElroy's ledger account without mention of profits, (p. 162,) but when McElroy brought suit for them in 1867, he admitted his claim by his (Ludlum's) answer, (p. 175,) and it was only defeated, both here and in the Court of Chancery, by the resistance of the Buckinghams.

In the opinion written by the Court below, it is said as a reason for giving McElroy large compensation, that McElroy had been a worker in iron for 25 years; but this was only as puddler, (p. 34, l. 25): another reason assigned is that the firm had become the owners of the patent process; as to this enough has been already said. Another reason is that his services were "skilful, constant, faithful and highly beneficial," and that such was the confidence of his employers, that neither gave any attention to that department of their business which he conducted; all this was as true of his services and duties and of their confidence from 1867-69, when McElroy himself had fixed his own compensation at $2,000. It is respectfully submitted that there is nothing in these reasons to explain why, the question resting entirely on the *quantum meruit*, there should be a sudden jump from $2,000, prior to July, 1869, to $4,000, after that time.

Point II.

All the foregoing argument rests upon the assumption that the contract as it existed in 1868-9, had come to an end. But where is the evidence of this? It was sought

to terminate it by a new contract; but such new contract never having acquired any legal force, the old contract must be deemed to have continued, in the absence of any other agreement between the parties.

The Grover and Baker Sewing Machine Co. vs. *Bulkley*, 48 Ill. 189.

Coe vs. *Charlies Coal Co.*, 25 Penn. St. 337.

Ross vs. *Harden*, 79 N. Y. 84.

Point III.

McElroy is not in a position to ask that the Court, (the receiver being no more than its representative,) shall pay him this money. He has not proved his right to it as against Mrs. Buckingham, the only person who is interested in the fund now in the receiver's hands, and he has now, through lapse of time, lost his right to prove his claim against her.

This proceeding is, at least, premature. The petitioner makes two averments as to the alleged debt. First. That the firm owed him when the receiver was appointed, (November 17, 1874,) $25,000, (p. 2, l. 14; p. 1, l. 27.) Second. That on September 10, 1880, he brought suit against Ludlum as surviving partner, and therein recovered a judgment against Ludlum as such for $21,300 and costs; and his prayer is that: "An order may be made "directing the receiver to pay to your petitioner the "balance of his said claim, (*at least to the extent of said "judgment,*) out of the assets of the estate in his hands."

Now, it is an admitted fact in this case, that Ludlum, by the decree of this Court, owes the estate $73,975.47, with interest for several years past, (p. 113, l. 22,) no part of which has been paid, (p. 115, l. 39,) and that he has no property with which to pay it, except, as he says, a claim against Mrs. Buckingham, decided against him in the Court of Chancery, (p. 115, l. 40, *et seq.*) The property in the receiver's hands, therefore, belongs to Mrs. Buckingham. A judgment against the surviving

partner is no evidence against the representative of the deceased partner, (in this case Mrs. Buckingham.) *Smith* vs. *Ballentine*, 10 Paige, 101 ; *Trustees of Teake* vs. *Watts Orphans' House*, 11 Paige, 80. Consequently the petitioner's position is this : He comes into Court and asks to be paid out of a fund which belongs to one against whom he has never established his debt. It would be hard to find a precedent for such a course as this.

But not only so, it was, at the time he filed his petition, (June, 1881,) impossible for him to establish his debt against Mrs. Buckingham, as executrix of James Horner. Horner died June 9, 1874; no claim, even to recover the fair value of his services, was made until July 26, 1880, (p. 3, l. 40,) and no suit to recover therefore was begun until Sept. 10, 1880, (p. 4, l. 10.) This suit was manifestly collusive, as will appear by reading Ludlum's examination on p. 105, *et seq.*, and exhibits from p. 164 to 168. All right of action against Ludlum was barred therefore on June 9, 1880, and being barred as against him, it was also barred as against the executrix of the deceased partner. *Trustees of Teake* vs. *Watts Orphans' House*, 11 Paige, 80 ; same case on appeal, 2 Denio, 577. Being barred then, it surely could not be revived, as against the executrix, by the collusive action of McElroy and Ludlum. The Court below in its opinion, alludes to the fact that the petitioner delayed presenting his claim at his, (Ludlum's) request, but the claim here referred to was a claim for a share in the profits. The present claim was never dreamed of until after the decision of this Court in *McElroy* vs. *Ludlum*, (5 Stew. 829,) at the June term, 1880, and after Ludlum had ceased to be receiver.

But it is said that the appointment of a receiver suspended the operation of the statute of Limitations as against creditors, he having become a trustee for them. That such is not the ordinary effect of such an appointment, it appears from the following authorities :

High on Receivers, § 184, 135.

Anon, 2 Atk. 15.

Harrison vs. *Duignan*, 2 Dr. and War. 295.
Groome vs. *Blake*, 6 Irish C. L. 401.
Ib., 8 Irish C. L. 432.

And it certainly cannot have that effect in a case of this sort. It is respectfully submitted that the argument in support of the contention that it does, overlooks a clear distinction well illustrated by *Wrixon* vs. *Vize*, 3 Dr. and War. 123, which is relied upon in the opinion of the Court below. There the plaintiff claiming an interest in land filed his bill, and a receiver, in his interest, took possession. It was held that while the receiver remained in possession, the statute of Limitations did not run against the plaintiff, for the obvious reason that the receiver's possession was his possession. But will it be concluded from this that the appointment of a receiver to take charge of the personal property of the debtor prevents the statute from running against the creditors, even though the appointment be coupled with a direction to do that which the debtor himself was obliged to do, viz., to pay debts? The creditor's action is against the debtor, not against the receiver; and yet McElroy seems to imagine that by presenting this petition he makes the receiver his debtor. He does nothing of the sort; no order for creditors to bring in their claims has ever been made in the main suit; the creditors of the firm have in nowise intervened therein. It was a suit instituted and carried on for an entirely different purpose, viz., to adjust the relative rights of Ludlum and Mrs. Buckingham. McElroy's position in this matter is that of an entire stranger, and in this character only does he come in, alleging that the late firm owed him a debt and asking payment of it. But he fails to show that he has ever established it against Mrs. Buckingham, the only person now interested in the fund.

Cases like *Sterndale* vs. *Hankinson*, 1 Simons, 393, rest upon an entirely different basis. There one creditor files his bill against the debtor on behalf of himself and all other creditors. These creditors are, in legal contempla-

tion, parties from the outset, and, of course, the statute does not run against them after bill filed.

Cases like *Hecker's Appeal*, 24 Penn. St. 482, and *Kirk's Appeal*, 40 Penn. St. 90, are cases of express trust and expressly decided on that ground.

~~In the absence of fraud, courts of equity feel themselves bound by the statutes, except in cases of express trusts. *McClane* vs. *Shepherd*, 6 C. E. Gr. 76. Here the attempt is to engraft upon it another exception.~~

Except in cases of express trust, courts of equity, in the absence of fraud, apply the statutes in the same manner that courts of law do. *McClane* vs. *Shepherd*, 6 C. E. Gr. 76. In the case in hand the effort is, in effect, to create another exception to its general application, an exception which would, on principle, apply as well to the case of an administrator, or person holding property for another in a fiduciary capacity (other than on a technical trust,) as to the case in hand.

For these reasons it is submitted that the order should be reversed with costs.

FREDERIC W. STEVENS.

W. S. Sharp Printing Co., 23 and 25 N. Warren, St., Trenton, N. J.

COURT OF ERRORS AND APPEALS.

Between

ANDREW KIRKPATRICK, Receiver,

Appellant,

and

JOSEPH W. McELROY,

Respondent.

On Appeal from Decree advised by Vice Chancellor Van Fleet.

Points of John R. Emery, for Respondent.

FIRST POINT.

The legal objections raised by the appellant in the court below to the consideration of respondent's claim *upon its merits*, were fully and ably presented to the Vice-Chancellor, and were, after due consideration, overruled on grounds so clearly and forcibly stated in his opinion that, on these points, I shall not go beyond a statement of the objections and his answers to them, and a reference to a few additional cases.

The objections were:

First. That the judgment of dismissal of McElroy's bili

in chancery, filed against Ludlum as receiver, and others, was a bar to any recovery upon the present claim.

(See Record, p. 9, l. 20, &c., defence set up in answer.)

The *answer* to this insistment is that the cause of action upon which the bill was founded was not the cause of action now relied on, and that the decree of dismissal did not and was not intended to operate as a bar to the present claim.

The bill was based upon a *claim to a share of the profits* of the business, as founded upon an express contract, and *prayed an account.* (See Bill, p. 170, ¶ 2, &c.; prayer of bill, p. 173, &c.) The decree (p. 182) adjudged that he was not entitled to the relief *sought and prayed for by the bill.*

The difference between the nature of the claims in the two different proceedings needs no elaboration beyond the Vice-Chancellor's statement at p. 186, but it may properly be added that, in the opinion of this court in the chancery suit in McElroy *v.* Ludlum, 5 Stew. 828, this form of proceeding (that of an action to recover the *value* of his services) was expressly pointed out as the remedy which the petitioner should have pursued.

Second. That the court should not inquire into the merits of petitioner's claim, because it is barred by lapse of time, *i. e.*, either (1) the time fixed by positive law, the statute of limitations, or (2) such laches in the pursuit of his remedy as to disentitle him to relief.

As to (1) the statute of limitations, the answers of the Vice-Chancellor (pp. 189–193) are clear and satisfactory. These are:

First. That the present claim is for the payment of a partnership debt out of moneys of the partnership held by the receiver appointed by the Court of Chancery upon the *express trust* to first pay the debts of the firm, (see petition, p. 1, &c., ans., p. 6,) and that this order of the court

created a trust which relieved the debts from the operation of the statute (pp. 190, 191, and cases cited); and see, also, 1 Dan. Ch. Pr., (3d ed.) 667, as to the analogous case of bankruptcy proceedings, where the appointment is held to have the effect of a judgment and execution in favor of all creditors whose claims are established. Also, Kurtz' Appeal, 40 Pa. St. 90, deciding that where money is held in trust, and is not recoverable at law, but only in equity, the statute will not run; and Spindale *v.* Hankinson, 1 Sim. 393, that a creditor's bill, on which decree is entered, stops the running of the statute from the *time of bill filed.*

Second. That, by taking possession of all the partnership property, and retaining it for administration and distribution, the Court of Chancery changed the remedy of the creditor against the partnership assets, from a legal to an exclusively equitable remedy, and that, to such remedies, the statute does not apply (pp. 192–194.)

[I add one additional suggestion, viz., that the persons interested in sustaining this objection made in the receiver's name (Mrs. Buckingham), is a non-resident of this state, and, under the provisions of the statute, is not entitled to set up the statute in her own name. (See bill for receiver filed by Mrs. Buckingham.) Statute of Limitations, § 8, Rev. 595.]

As to (2) that the petitioner has been guilty of laches in the prosecution of his claim, and for that reason has lost all equitable right to an inquiry into his claim on the merits, the record, as shown by Vice-Chancellor's opinion, disposes of this pretence. (See p. 194.) Proof. *Bill filed in* 1877 and prosecuted without delay. Most of the time consumed in this suit was in taking *an account* of the profits, on an interlocutory decree of the court, *decreeing that he was entitled to an account,* which decree was, on final hearing, after the accounts were in and upon further proof, reversed by the Court of Chancery itself. (See record of chancery suit.) The moderate delay in filing bill was due to the

request of the receiver then in charge of the funds (p. 120, l. 10, &c.) A further answer of the Vice-Chancellor to the alleged laches (even if it existed) is the position that no laches can be made the reason for dismissing a claim for a remedy against assets in court. See p. 194, l. 35, 196, and cases cited.

These legal objections to the consideration of petitioner's claim on the merits, being out of the way, the case stands in the position stated by the Vice-Chancellor, on p. 187, l. 22, &c., and the claim for compensation is entitled to be heard and decided upon its merits.

SECOND POINT.

The amount of compensation allowed by the Vice-Chancellor, $4000 per annum, with interest only from the time of presenting the claim in its present form (decree, p. 198, fol. 10, &c.; July 26th, 1880, *petition and answer*,) was not only clearly justified by the evidence, but the only doubt is, whether it should not have exceeded this sum.

This was the Vice-Chancellor's own difficulty after a careful and patient consideration of the evidence in relation to the character of the services and the compensation of others possessing like qualifications for similar services. The Vice-Chancellor's statement (pp. 188, 189) as to the nature of the services, is judicial and fair, and does not go beyond the clear effect of the evidence; his method of arriving at a valuation of the services, which were not of a kind in general demand, having a technical "market value," but required special skill, experience and judgment, was the only practicable method, being based to some extent on the compensation paid to others with like qualifications for similar services; and the sum finally determined on being, from the very nature of the proceedings and claim (that of a *quantum meruit*), left to a fair and just discretion, was certainly within the limits fixed by the

evidence, and should not be disturbed by this court on appeal.

I add only references to the testimony showing the evidence relied on by the Vice-Chancellor, with references also to additional facts, that give further support to his conclusions, if this be necessary.

McElroy, pp. 13, 14, as to his skill and experience previous to the employment in July, 1869; p. 15, as to giving up other interests of his own in order to continue the employment and the special inducements thereto; p. 17–21, as to the general character and extent of his work, and its faithful performance after the contract; p. 21, &c., as to his absolute reliance on the contract and leaving his earnings with the firm (p. 21, l. 35, &c.; p. 22); p. 33, l. 10, &c., employed nearly all the men; p. 34, attended day and night to superintendence—taught the men the process of manufacture; p. 37, neither of the partners was a practical manufacturer, or gave attention to this part of the business.

Wright, p. 48, as to the new arrangement made about July, 1869, and the charge in the books to a separate account; pp. 49, 50, and *Exhibit* 1, p. 160, as to the great increase in the business under McElroy's new arrangement; p. 55, as to the stopping of his salary after July, 1869; p. 63, l. 10, that Ludlum took no part in superintending the manufacture.

Ludlum, pp. 66, 68, as to McElroy's employment and duties previous to July 1st, 1869; p. 69, the new arrangement about that time; pp. 70, 71, the increase in the business from that time, and McElroy's exclusive charge relieving both partners (p. 71, l. 10, &c.); *cross examination*, p. 80, l. 20, &c., McElroy's gradual increase in duties; p. 113, line 20, &c., as to Ludlum's insolvent condition; pp. 119, 120, as to requesting McElroy to delay proceedings.

John Cox, p. 93, l. 30, McElroy controlled the employment and discharge of the men, and managed so that there

were no difficulties or strikes. As to the *value of the services*, as indicated by compensation in other establishments for similar services:

James R. Thompson, pp. 130–154, he fixes the value at $5000 per year, (pp. 132, 133,) and the comparison developed on cross-examination between his works, where a general superintendent is paid $5000, (p. 140, l. 33, &c.,) who is seldom there at night (p. 142), and has a day and night assistant superintendent, and where two of the partners are practical manufacturers, who commenced as workmen (p. 136), and still superintend the manufacture (p. 152, l. 25, p. 153,) together with his statements, (pp. 143–147,) as to the special value, of Mr. McElroy's services, would altogether seem to establish that Mr. Thompson's own figures would have been the fairest basis for decision; and that McElroy is really the person aggrieved by the decision of the Vice-Chancellor lowering this reasonable limit.

The evidence of the witnesses called by the respondent is altogether unsatisfactory as an *absolute* basis for fixing the value.

Hopper, who fixes $3000 on the simple hypothesis of amount of product, disconnected from any other circumstances of the service, (p. 39), had himself a salary or pay during the same time of from $8000 to $15,000 a year during the period in question, where the product was less (p. 40), and even then one of the most important and vital of the processes superintended by McElroy was not used (p. 40, l. 31, &c.); he had also an *assistant* superintendent at $2500 (p. 41), and was not himself relieved from the supervision (p. 40, l. 10, &c., l. 30, &c.)

Jennings, (pp. 155–157.) This witness, who has just commenced the manufacture (p. 155, l. 18, &c.,) and who, during the period in question, was a young salesman who knew nothing about the manufacture, (p. 157, &c.,) fixes the compensation at $2000 to $2500. His opinion was properly

treated as entitled to no weight as fixing the *absolute* limit of compensation.

The above were all the witnesses upon the question except McElroy himself, who thought he was entitled to not less than $5000 (p. 101, l. 20, &c., 102, l. 1, &c.) and *Ludlum*, who fixes amount at $6000, (p. 95, &c.,) and against whom petitioner has now a judgment on that basis. At the time when the agreement for further employment was made, (about July 1st, 1869,) it certainly could not have been made on the basis of the *extreme* limit of $3000 per annum now contended for; and, taking this fact in connection with all the evidence, the Vice-Chancellor's conclusion as to the matter of fact now in dispute, cannot be reversed by the appellant, ~~because~~ it was *clearly wrong*.

The claim set up in the answer that McElroy's whole claim is a fraud, and the result of a fraudulent combination with Ludlum to defraud Mrs. Buckingham, was clearly unsupported by any evidence, and is emphatically disproved by the positive evidence of witnesses and the conduct of all the parties from the very time of commencing the employment, (five years before Horner's death.) The direct evidence of three witnesses, McElroy, Ludlum and Wright, (the latter certainly honest, beyond the reach of even the most violent and prejudiced suspicion); the charge in the method of keeping the accounts, Wright (pp. 48, 50); McElroy's stopping the drawing of any salary (p. 55, l. 30; p. 63, l. 33, &c.,) even to the amount of $3000, and leaving with the firm all his money except that absolutely required for living expenses, (p. 21, l. 34,) so that even his patent wasn't paid for till after Horner's death, (p. 72, l. 10, &c.); all these and many other circumstances establish the *bona fide* character of the present claim, and relieve the court from the decision of any question except ~~that of the Vice-Chancellor's~~ clear error and mistake in fixing its amount.